

Cite as Det. No. 16-0282, 36 WTD 516 (2017)

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 of)	
)	No. 16-0282
)	
...)	Registration No. . . .
)	

[1] RULE 173; RULE 193; RCW 82.08.0265: RETAIL SALES TAX – INTERSTATE AND FOREIGN SALES DEDUCTION – REPAIR SERVICES FOR OUT-OF-STATE-PERSONS – NONRESIDENT BUYERS – PROGRESS PAYMENTS – PROOF OF OUT-OF-STATE DELIVERY. Payments received prior to the completion of restoration work performed in Washington on vehicles for nonresidents, are subject to the interstate and foreign sales deduction in RCW 82.08.0265 for periods prior to July 24, 2015, when the statute was repealed. Entitlement to the deduction requires proof of subsequent delivery of the vehicles to nonresident buyers at a point outside this state, or to a common or bona fide carrier consigned to the buyer for delivery at a point outside this state.

[2] RULE 173; RCW 82.32.730: RETAIL SALES TAX – SSUTA – SOURCING – INTERSTATE AND FOREIGN SALES DEDUCTION – REPAIR SERVICES FOR OUT-OF-STATE-PERSONS – NONRESIDENT BUYERS – PROGRESS PAYMENTS – PROOF OF OUT-OF-STATE DELIVERY. Progress payments made on sales of auto restoration services performed in Washington for nonresidents who, upon consummation of the sales, will receive their completed vehicles at points outside of this state, are sourced to the place of receipt. Washington retail sales tax does not apply to such payments, so long as out-of-state delivery is contemplated by a seller’s agreement with purchaser, and out-of-state receipt indeed takes place upon consummation of the sale. Proof of out-of-state receipt is the same as that required for sales of tangible personal property in interstate commerce. Although Washington sales tax does not apply, sales sourced to out-of-state jurisdictions may be subject to tax laws in those jurisdictions.

[3] RULE 173; RCW 82.04.250; RCW 82.08.020: RETAIL SALES – RETAILING B&O TAX – REPAIR SERVICES FOR OUT-OF-STATE-PERSONS – NONRESIDENT BUYERS – PROGRESS PAYMENTS. Gross proceeds of sales of automobile restoration services performed in Washington for nonresidents, and progress payments made toward such sales, are subject to Washington retailing 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.

LaMarche, T.R.O. – A vehicle restoration business disputes the denial of Interstate and Foreign Sales deductions, and resulting assessment of retail sales tax, on income it derived from progress payments paid for restoration work performed on vehicles for nonresidents. The vehicles were located in this state when the progress payments were made, prior to out-of-state delivery to nonresidents, or delivery of the vehicles to common or bona fide carriers consigned to out-of-state delivery to nonresidents. Because the payments were made for interstate sales to nonresidents, we conclude that the business is allowed to take the Interstate and Foreign Sales deduction for income derived from such progress payments during the audit period.

However, if Taxpayer is later unable to show that completed sales meet the statutory requirements to qualify for the nonresident sales tax exemption, Taxpayer will be liable for any unpaid sales tax on those sales. We grant the petition, and remand to the operating division for adjustments to the assessment.¹

ISSUE

Under RCW 82.08.0265, WAC 458-20-173, and WAC 458-20-193, is Taxpayer allowed to take the Interstate and Foreign sales deduction with regard to progress payments for restoration work performed on vehicles for nonresidents, when Taxpayer receives the payments prior to completion of the work, but Taxpayer subsequently delivers the vehicles to nonresident buyers at a point outside this state, or to a common or bona fide carrier consigned to the buyer for delivery at a point outside this state?

FINDINGS OF FACT

[Taxpayer] is a sole proprietorship based in . . . Washington that provides restoration services, such as rust repair, performance improvements, and upholstery jobs for vintage cars and race cars. Through a subcontractor, Taxpayer provides extensive metal fabrication services. Taxpayer also sells vintage vehicle parts and accessories through the internet. Taxpayer provides its services to both Washington residents and nonresidents. At issue is the tax treatment of progress payments on certain jobs Taxpayer performed for nonresidents.

The Audit Division of the Department of Revenue (Department) audited Taxpayer's business activities for the period from January 1, 2011, through December 31, 2014. The Audit Division found, in relevant part, that Taxpayer had reported income from certain progress payments and had taken an Interstate and Foreign Sales Deduction with respect to that income. The Audit Division concluded that the transactions did not qualify for the nonresident sales tax exemption because the vehicles for which the progress payments were made had not yet been delivered to nonresident buyers at a point outside this state, or to a common or bona fide carrier consigned to the buyer for delivery at a point outside this state. The Audit Division concluded that the progress payments on those jobs were subject to retail sales tax, and disallowed the Interstate and Foreign sales deductions with regard to those payments.

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

The Department issued an assessment against Taxpayer on June 2, 2015, for the period of January 1, 2011, through December 31, 2014 (Audit Period), Document No. The assessment totaled \$. . . , which was comprised of a \$. . . small business credit adjustment, \$. . . in uncollected retail sales tax, \$. . . in retailing business and occupation (B&O) tax, \$. . . in services and other activities B&O tax, \$. . . in use tax and/or deferred sales tax, interest of \$. . . , and a 5% assessment penalty of \$ Taxpayer did not pay the assessment, but timely filed a petition for review. The Taxpayer contests only the portion of the assessment that asserts retail sales tax against progress payments that Taxpayer received from certain out-of-state customers for ongoing vehicle restoration projects.

During the audit, Taxpayer provided copies of sales invoices and a customer list as proof that the vehicles would be delivered to the out-of-state addresses written on the sales invoices. After the assessment was issued, and prior to the hearing on September 24, 2015, Taxpayer provided copies of contracts dated after the Audit Period for restoration services for each of the disputed jobs in progress. Each contract discusses requirements for the sales tax exemption, provides that the nonresident customer will submit documentation proving an out-of-state residence, and that the customer will take delivery of the vehicle at a point out of this state, or will arrange delivery at a point outside of this state through a common carrier. Taxpayer has provided copies of government-issued identification and other records verifying that all of the customers are nonresidents.

ANALYSIS

Washington law imposes a B&O tax on every retail sale in this state not otherwise exempt or excluded from such taxation. RCW 82.04.250; RCW 82.08.020. A “retail sale” is defined under RCW 82.04.050(2) to include:

[T]he sale of or charge made for tangible personal property consumed and/or for labor and services rendered in respect to the following:

- (a) The installing, repairing, cleaning, altering, imprinting, or improving of tangible personal property of or for consumers . . .

RCW 82.04.050(2)(a).

If the seller fails to collect retail sales tax legally due, or having collected it, fails to pay it to the Department, the seller is personally liable to the state for the amount of the tax. RCW 82.08.050.

Repair Services for Out-of-State Persons under Rule 173 and RCW 82.08.0265.

During the audit period, RCW 82.08.0265² provided an exemption from retail sales tax for certain sales or repair services to nonresidents, as follows:

² RCW 82.08.0265 was repealed, [effective July 24, 2015,] along with several unrelated statutory provisions, for the stated purpose of “[e]liminating obsolete or redundant statutory provisions.” *See* Laws of 2015, ch. 86, § 101. Because RCW 82.08.0265 was in effect during the Audit Period, we apply the statute in our discussion here.

The tax levied by RCW 82.08.020 shall not apply to sales to nonresidents of this state for . . . sales of or charges made for labor and services rendered in respect to any installing, repairing, cleaning, altering, or improving, of personal property of or for a nonresident, but this section shall apply only when the seller agrees to, and does, deliver the property to the purchaser at a point outside this state, or delivers the property to a common or bona fide private carrier consigned to the purchaser at a point outside this state . . .

WAC 458-20-173 (Rule 173) is the Department's duly adopted administrative rule that addresses, in part, the tax treatment of repairs to tangible personal property for nonresidents. Rule 173 states, in pertinent part:

REPAIRS FOR OUT-OF-STATE PERSONS. Persons residing outside this state may ship into this state articles of tangible personal property for the purpose of having the articles repaired, cleaned, or otherwise altered, and then returned to them. The retail sales tax is not applicable to the charge made for labor and/or materials, provided the seller, as a requirement of the agreement, delivers the property to the purchaser at a point outside this state or delivers the property to a common or bona fide private carrier consigned to the purchaser at a point outside this state. Proof of exempt sales will be the same as that required for sales of tangible personal property in interstate commerce. See WAC 458-20-193. No deduction is allowed, however, under the business and occupation tax . . .

Rule 173 (emphasis added). With regard to the required proof in WAC 458-20-193 (Rule 193)(pre-2015))³ to which Rule 173 refers, Rule 193(pre-2015) states:

[F]or proof of entitlement to exemption, the seller is required to retain in his records documentary proof (1) that there was such an agreement and (2) that delivery was in fact made outside the state. Acceptable proof will be:

- a) The contract or agreement AND
- b) If shipped by a for hire carrier, a waybill, bill of lading or other contract of carriage by which the carrier agrees to transport the goods sold, at the risk and expense of the seller, to the buyer at a point outside the state; or
- c) If sent by the seller's own transportation equipment, a tripsheet signed by the person making delivery for the seller and showing the (1) buyer's name and address, (2) time of delivery to the buyer, together with (3) signature of the buyer or his representative acknowledging receipt of the goods at the place designated outside the state of Washington.

Taxpayer argues that the delivery language in RCW 82.08.0265 is meant only for completed purchases. The Department's interpretation of the statute, Taxpayer argues, creates an interim tax liability on transactions that the legislature intended to exempt, thereby placing unnecessary burdens on the parties involved. We agree that the "delivery" language applies to completed sales, in that qualification for the tax exemption ultimately requires proof of such out-of-state delivery.

³ Rule 193 was amended in 2015, after the end of the Audit Period. We refer to the older version of the rule in effect during the Audit Period, and designate it as "Rule 193(pre-2015)."

However, the issue here is whether a taxpayer may claim an Interstate and Foreign Sales deduction on income derived from charges made during the course of work in progress.

The basis for the Audit Division's disallowance of the Interstate and Foreign Sales deduction and corresponding assertion of retail sales tax on the nonresidents' progress payments, is that the vehicles were still located in this state when the payments were made, and therefore out-of-state delivery cannot have occurred. Therefore, the Audit Division contends, Taxpayer did not meet the requirements of RCW 82.08.0265 with regard to the disputed progress payments. . . .

The goal of interpreting a statute is to carry out the intent of the legislature. *Lake v. Woodcreek Homeowners Ass'n*, 169 Wn.2d 516, 526, 243 P.3d 1283 (2010). Disallowing the Interstate and Foreign Sales deduction for progress payments, solely on the basis that the tangible personal property is still located in this state, would require the instate business to either 1) collect sales tax from the very nonresident customer it is hoping to attract with the sales tax exemption, or 2) use its own funds to pay sales tax on the transaction prior to completion of an executory contract—and then to later apply for a refund. Both options would place the instate business at a significant competitive disadvantage with regard to its out-of-state competition. We do not find it plausible that the legislature intended such a result when it created the exemption under RCW 82.08.0265. On the contrary, the sales tax exemption for nonresidents is designed to put Washington businesses on the same footing as out-of-state businesses located in tax-free or lower tax jurisdictions with whom they must compete.

RCW 82.08.0265 stated that the nonresident sales tax exemption applies to “sales of or charges made for labor and services rendered.” (Emphasis added.) We interpret this language to mean that the statute contemplated charges made for labor and services rendered in circumstances, such as those here, where a sale has not yet been completed. It follows that in addition to completed sales, the sales tax exemption applies to charges for labor and services provided during the course of work in progress, including progress payments.

We interpret RCW 82.08.0265 to mean that so long as a seller enters into an agreement with a nonresident purchaser that contemplates delivery of the property to the nonresident purchaser at a point outside this state, or delivery of the property to a common or bona fide private carrier consigned to the purchaser at a point outside this state, then the seller may claim the Interstate and Foreign Sales deduction. This applies with respect to progress payments made pursuant to such an agreement. However, due to the instate nature of Taxpayer's activities, Taxpayer is required to pay Retailing B&O tax, and is not entitled to take a deduction from the Retailing B&O tax for gross receipts derived from repairs to out-of-state persons. Rule 173.

Taxpayer is also subject to the documentation requirements under RCW 82.08.0265 that are described in Rule 173 and Rule 193(pre-2015), with regard to its tax-exempt sales of repair services to out-of-state persons. After completion of such sales, including delivery, Taxpayer must maintain and produce the required documents to prove that the sales qualify for the tax exemption under RCW 82.08.0265. Failure to satisfy the documentation requirements may result in Taxpayer's liability for uncollected sales tax pursuant to RCW 82.08.050, if no other exemption or exclusion applies.

Our interpretation gives full effect to all language in the statute, and achieves the purpose of the statute, which is to put in-state businesses on an equal footing with their out-of-state competitors, with respect to certain sales to nonresidents. Accordingly, we grant the petition as to the Audit Period from January 1, 2011, through December 31, 2014.

Sourcing of Sales under SSUTA and RCW 82.32.730.

Because RCW 82.08.0265 was repealed in 2015 (*see* footnote 2), for purposes of post-Audit Period tax periods and future reporting instructions for Taxpayer, we turn now to a discussion of retail sales tax and the Interstate and Foreign Sales deduction in the context of sourcing under SSUTA, as codified under RCW 82.32.730.

The Washington legislature adopted the Streamlined Sales and Use Tax Agreement (SSUTA) on March 22, 2007,⁴ effective on July 1, 2008. Laws of 2007, ch. 6, §501; *see also North Central Washington Respiratory Care Services, Inc. v. Dep't of Revenue*, 165 Wn. App. 616, 268 P.3d 972 (2011). The legislature codified the sourcing provisions of SSUTA in RCW 82.32.730. RCW 82.32.730(1) provides:

Except as provided in subsections (5) through (8) of this section, for purposes of collecting or paying sales or use taxes to the appropriate jurisdictions, all sales at retail shall be sourced in accordance with this subsection and subsections (2) through (4) of this section.

(a) When tangible personal property, an extended warranty, a digital good, digital code, digital automated service, or other service defined as a retail sale under RCW 82.04.050 is received by the purchaser at a business location of the seller, the sale is sourced to that business location.

(b) When the tangible personal property, extended warranty, digital good, digital code, digital automated service, or other service defined as a retail sale under RCW 82.04.050 is not received by the purchaser at a business location of the seller, the sale is sourced to the location where receipt by the purchaser or the purchaser's donee, designated as such by the purchaser, occurs, including the location indicated by instructions for delivery to the purchaser or donee, known to the seller.

(c) When (a) and (b) of this subsection do not apply, the sale is sourced to the location indicated by an address for the purchaser that is available from the business records of

⁴SSUTA is the "result of the cooperative effort of 44 states, the District of Columbia, local governments and the business community to simplify sales and use tax collection and administration by retailers and states. The Agreement minimizes costs and administrative burdens on retailers that collect sales tax, particularly retailers operating in multiple states." *Frequently Asked Questions*, Streamlined Sales Tax Governing Board, Inc., http://www.streamlinedsalestax.org/index.php?page=gen_1 (last visited August 31, 2016); *see also Qualcomm, Inc. v. Dep't of Revenue*, 171 Wn.2d 125, n.8, 249 P.3d 167 (2011); *Indiana Dep't of Revenue v. Kitchin Hospitality, LLC*, 907 N.E.2d 997, 1000, n.2 (Ind. 2009). SSUTA seeks to accomplish its goal by providing uniform definitions and sourcing rules. *Indiana Dep't of Revenue v. Kitchin Hospitality, LLC*, 907 N.E.2d 997, 1000, n.2. States that wish to participate must enact laws, rules, and regulations that conform to SSUTA's provisions, pursuant to SSUTA, Article III.

the seller that are maintained in the ordinary course of the seller's business when use of this address does not constitute bad faith

RCW 82.32.730(9)(f) defines “receive” and “receipt” as:

[T]aking possession of tangible personal property, making first use of digital automated services or other services, or taking possession or making first use of digital goods or digital codes, whichever comes first. “Receive” and “receipt” do not include possession by a shipping company on behalf of the purchaser.

(Emphasis added.) Under destination-based sourcing in SSUTA and RCW 82.32.730, sales are sourced to the “location where receipt by the purchaser or the purchaser’s donee, designated as such by the purchaser, occurs.” RCW 82.32.730(1)(b); *see also* Det. No. 09-0203, 29 WTD 31, 33 (2010) (pursuant to RCW 82.32.730(1), a commercial printer’s sales of print services and printed materials to be distributed to multiple locations is sourced to the location where the print services and printed materials are delivered).

Here, the purchasers are nonresidents who, upon consummation of the sales, will receive their completed vehicles at points outside of this state. Receipt in this state does not include possession by a shipping company on behalf of the purchaser. RCW 82.32.730(9)(f). Under RCW 82.32.730(1)(b), such sales are sourced to the place of receipt which, in this case, are other states. Therefore, Washington retail sales tax does not apply to such sales, so long as out-of-state delivery is contemplated by seller’s agreement with purchaser, and out-of-state delivery indeed takes place upon consummation of the sale.

Rule 173’s document requirements for repairs for out-of-state persons are still in effect, and provide that Washington retail sales tax⁵ does not apply to such services,

provided the seller, as a requirement of the agreement, delivers the property to the purchaser at a point outside this state or delivers the property to a common or bona fide private carrier consigned to the purchaser at a point outside this state [and maintains and produces proof which is] the same as that required for sales of tangible personal property in interstate commerce. See WAC [458-20-193](#). No deduction is allowed, however, under the business and occupation tax.

Id.

We note that Rule 193 was revised in 2015, and that Rule 173 still refers to the list under the older version of the rule, Rule 193(pre-2015). That list does not appear in the newer version of the rule. However, Rule 173 also indicates that the proof is the same as that required for sales of tangible personal property in interstate commerce, which is the same proof listed under Rule 193(pre-2015), as follows:

⁵ **Tax liability in out-of-state jurisdictions.** We note that Taxpayer or its out-of-state customers may have tax liability in the jurisdictions where sales are sourced pursuant to RCW 82.32.730. Those jurisdictions should be contacted for information about the taxation of such sales.

(1) that there was such an agreement AND

(2) that delivery was in fact made outside the state, such as the contract or agreement and, if shipped by a for hire carrier, a waybill, bill of lading or other contract of carriage by which the carrier agrees to transport the goods sold, at the risk and expense of the seller, to the buyer at a point outside the state; or sent by the seller's own transportation equipment, a trip sheet signed by the person making delivery for the seller and showing the (1) buyer's name and address, (2) time of delivery to the buyer, together with (3) signature of the buyer or his representative acknowledging receipt of the goods at the place designated outside the state of Washington.

Rule 193(pre-2015)(1)-(2). If Taxpayer is unable to produce suitable records to prove that sales should be sourced outside of this state, then Taxpayer will be personally liable for any unpaid Washington State retail sales tax, pursuant to RCW 82.08.050.

...

We grant the petition, and remand to the operating division to make adjustments in accordance with this determination.

DECISION AND DISPOSITION

Taxpayer's petition is granted.

Dated this 1st day of September 2016.