

Cite as Det. No. 20-0253, 41 WTD 213 (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 of )	
)	No. 20-0253
)	
... )	Registration No. . . .
)	

FORMER RCW 82.08.962: RENEWABLE ENERGY – SALES AND USE TAX – M&E EXEMPTION – QUALIFYING PARTY. The exemption provided by former RCW 82.08.962, which was issued in the form of a remittance, was available only to purchasers, not sellers. Therefore, where a seller failed to collect the tax on an otherwise qualifying sale, the seller cannot claim the exemption to relieve itself of its liability for the tax it failed to collect.

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.

Farquhar, T.R.O. – A biogas engineering and operations company protests the Department’s assessment of retail sales tax on certain sales the company made to a customer that operates a renewable energy facility. At the time of the sales, the company believed the sales were subject to a retail sales tax exemption offered to certain renewable energy producers and did not collect the tax from the customer. In fact, the subject exemption required eligible buyers to first pay the tax in full, then apply for a refund from the Department. The company argues that the Department should reduce the assessment by the amount of tax that the customer would have received as a refund. However, as the seller, the company is not eligible for the exemption and cannot be relieved of its duty to collect retail sales tax on the subject sales regardless of whether the buyer may have qualified for a refund under the subject exemption. Petition denied.<sup>1</sup>

ISSUE

Whether the Department may relieve a seller of its duty to collect retail sales tax on certain sales made to a renewable energy producer if the producer would have qualified for a refund of the retail sales tax as part of an exemption program authorized by RCW 82.08.962.

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

## FINDINGS OF FACT

... [Taxpayer] is an ... - business that specializes in providing ... [technical expertise in operations and engineering for the biogas use and management industries] . . . .

During the periods at issue here, Taxpayer sold equipment and provided operations management, repair, and maintenance services to . . . (“Customer”). The Customer operates a facility in . . . , Washington that produces energy from landfill gas. Prior to July 1, 2018, Taxpayer believed that the Customer was eligible for an exemption from retail sales tax on certain purchases it made from Taxpayer. Taxpayer believed that the exemption allowed the Customer to purchase items and services without paying retail sales tax. As such, Taxpayer made a number of retail sales to the Customer during the subject periods and did not collect retail sales tax.

On February 26, 2019, the Department’s Audit Division (“Audit”) began a review of Taxpayer’s books and records for the period of January 1, 2015, through December 31, 2018 (“Audit Period”). Audit requested that Taxpayer provide copies of relevant business records, including its excise tax returns, accounting records, sales reports and invoices, reseller permits, and supporting documentation for any deduction or exemption Taxpayer claimed. Taxpayer provided all of the records Audit requested.

After reviewing the documentation Taxpayer provided, Audit found that Taxpayer had reported all of the income it received from sales to the Customer under the service and other activities business and occupation (“B&O”) tax classification. Audit determined that Taxpayer reported its income derived from “operations [and] maintenance” correctly under the service and other activities B&O tax classification, but that “income from repairs and sales of equipment should have been reported under the retailing B&O [tax classification] and [was subject to] retail sales tax . . . .” See Audit Report . . . . Accordingly, Audit reclassified the “repairs and sales of equipment” income to the retailing B&O tax classification. Audit also concluded that the Customer was eligible for a retail sales tax exemption during the Audit Period. Prior to July 1, 2018, the exemption required the Customer to pay retail sales tax at the time of purchase, then apply for a refund from the Department. Because Taxpayer had not collected retail sales tax on its sales to the Customer, Audit assessed retail sales tax on all retail sales to the Customer that occurred prior to July 1, 2018.<sup>2</sup>

On August 15, 2019, Audit issued a Notice of Balance Due (“Assessment”) in the amount of \$ . . . . See Letter ID . . . . The Assessment is composed of \$ . . . in taxes, \$ . . . in penalties, and \$ . . . in interest. The tax portion of the Assessment includes \$ . . . in state and local retail sales tax<sup>[3]</sup> . . . ,

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<sup>2</sup> On July 1, 2018, Engrossed Substitute House Bill (ESHB) 2580 (Chapter 164, Laws of 2018) went into effect. See also Special Notice: Tax incentives for converting biogas into marketable coproducts and manufacturing wood biomass fuel, Washington State Department of Revenue (June 2018). Unlike the exemption that was in place during [most] of the Audit Period, which required buyers to pay the tax at the time of sale and later apply for a refund from the Department, the new law allowed qualified buyers to make qualified purchases without paying retail sales tax at all if they presented the seller with an exemption certificate at the time of sale. The Customer provided Taxpayer with an exemption certificate in July 2018, thus Audit did not assess retail sales tax on sales that occurred on or after July 1, 2018.

[<sup>3</sup> The sales that form the basis of the retail sales tax portion of the Assessment are referred to herein as the “subject sales.”]

\$. . . in state and local use tax, and a credit of \$. . . for overpaid B&O tax. Taxpayer has not paid the Assessment.

On September 9, 2019, Taxpayer submitted a timely petition for review (“Petition”). In it, Taxpayer acknowledges that it should have collected retail sales tax on the subject sales. However, Taxpayer requests a \$. . . reduction in the retail sales tax portion of the Assessment, which represents the refund the Customer could have requested had it paid retail sales tax on the subject transactions.<sup>4</sup> Taxpayer asserts that the Customer would have effectively paid only 25% of the tax after the refund, thus Taxpayer should only be responsible for that amount. Taxpayer only disputes the retail sales tax portion of the Assessment; it does not contest the remainder of the taxes, interest, or penalties.

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### ANALYSIS

RCW 82.08.020 imposes a retail sales tax on the selling price of each “retail sale” of tangible personal property and certain services, unless an exemption or exclusion applies. RCW 82.08.020(1)(a), (c). RCW 82.04.050 defines “retail sale” to include “the sale of or charge made for tangible personal property consumed and/or for labor and services rendered in respect to . . . [t]he installing, repairing, cleaning, altering, imprinting, or improving of tangible personal property of or for consumers[.]” RCW 82.04.050(2)(a). The definition of “retail sale” also includes the following:

[T]he sale of or charge made for tangible personal property consumed and/or for labor and services rendered in respect to . . . constructing, repairing, decorating, or improving of new or existing buildings or other structures under, upon, or above real property of or for consumers, including the installing or attaching of any article of tangible personal property therein or thereto whether or not such personal property becomes a part of the realty by virtue of installation . . . .

RCW 82.04.050(2)(b).

Here, Taxpayer made retail sales of equipment and repair and maintenance services to the Customer during the Audit Period. Sales of equipment constitute retail sales because sales of tangible personal property are included in the definition of “retail sale.” RCW 82.04.050(1)(a). Furthermore, Taxpayer’s sales of repair and maintenance services constitute retail sales because the services were rendered in respect to repairing and maintaining the Customer’s landfill gas facility and related tangible personal property. *Id.*; RCW 82.04.050(2)(b).

Sellers are required to collect retail sales tax from buyers on all retail sales and remit those funds to the Department. RCW 82.08.050(1). If a seller fails to collect the tax or, having collected the tax, fails to remit it to the Department, the seller is liable for the amount of the tax regardless of “whether such failure is the result of the seller’s own acts or the result of acts or conditions beyond

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<sup>4</sup> As discussed below, the subject exemption allowed for a refund of 75% of the retail sales tax paid on qualifying purchases. 75% of the retail sales tax portion of the Assessment equals . . . .

the seller's control[.]” RCW 82.08.050(3). Sellers will not be relieved of personal liability for the tax unless they maintain “proper records of exempt or nontaxable transactions and provide them to the department when requested.” RCW 82.08.050(4).

Here, Taxpayer concedes that the subject sales were, in fact, retail sales and that it should have collected retail sales tax from the Customer. However, Taxpayer argues that the Department should waive 75% of the retail sales tax portion of the Assessment because the Customer would have received that amount as a refund if Taxpayer had collected the tax. As such, we will review the statutory authority for refunding retail sales tax on such sales and determine whether the Department may grant the relief Taxpayer requests.

Between July 1, 2011, and July 1, 2018, the version of RCW 82.08.962 in effect at that time partially exempted purchases of qualified machinery and equipment (“M&E”) used directly in generating electricity from renewable resources. The statute reads as follows:

(1)(a) Except as provided in RCW 82.08.963, *purchasers who have paid the tax imposed by RCW 82.08.020 on machinery and equipment used directly in generating electricity using fuel cells, wind, sun, biomass energy, tidal or wave energy, geothermal resources, anaerobic digestion, technology that converts otherwise lost energy from exhaust, or landfill gas as the principal source of power, or to sales of or charges made for labor and services rendered in respect to installing such machinery and equipment, are eligible for an exemption as provided in this section, but only if the purchaser develops with such machinery, equipment, and labor a facility capable of generating not less than one thousand watts of electricity.*

...

(c) Beginning on July 1, 2011, through January 1, 2020, the amount of the exemption under this subsection (1) *is equal to seventy-five percent of the state and local sales tax paid. The purchaser is eligible for an exemption under this subsection (1)(c) in the form of a remittance.*

...

(4)(a) *A purchaser claiming an exemption in the form of a remittance under subsection (1)(c) of this section must pay the tax imposed by RCW 82.08.020 and all applicable local sales taxes imposed under the authority of chapters 82.14 and 81.104 RCW. The purchaser may then apply to the department for remittance in a form and manner prescribed by the department.*

Former RCW 82.08.962(1)(a), (c), (4)(a) (emphasis added).

Former RCW 82.08.962 makes clear that the exemption in the form of a remittance is available only to purchasers. Here, Taxpayer was the seller and, therefore, does not qualify for the exemption. *Id.* . . . . As such, pursuant to RCW 82.08.050(1), Taxpayer had a duty to collect retail sales tax on the subject sales and remit the funds to the Department. The fact that the Customer may have received a refund of some of the tax does not alter Taxpayer's duty to collect the tax at

the time of the sales. For those reasons, we conclude that Taxpayer is not entitled to an adjustment of the Assessment, and we deny the Petition.

DECISION AND DISPOSITION

Taxpayer's petition is denied.

Dated this 15th day of September 2020.