
WASHINGTON

Washington Court Finds Marketing Display Company Subject to Tax**by Andrea Muse**

A company that arranges and manages in-store marketing displays for retail brands through subcontractors conducted taxable business activities in Washington, a state appellate court has found.

The Washington Court of Appeals, Division I, held April 25 in *Dynamic Resources Inc. v. Department of Revenue* that the company was making retail sales by hiring independent contractors to perform installation and repair work on visual displays and was subject to the state's retailing business and occupation (B&O) tax and retail sales tax.

"This is one of many cases over the years that serve as a reminder about how perilous a response to a tax nexus questionnaire can be," Michelle DeLappe of Fox Rothschild LLP told *Tax Notes* in an April 26 email. "These innocuous-looking questionnaires can be such a trap for companies that are focused on their business and not necessarily on the intricacies of tax statutes and regulations in each state."

DeLappe said companies that perform or subcontract services involving tangible property in Washington "should take a careful look at whether they are performing a retailing activity," adding that the state has one of the highest sales tax rates in the country. "Given the challenges of collecting sales tax from customers retroactively, analyzing the likely tax treatment early based on the company's specific facts is imperative," she continued.

"We are disappointed by the court's decision, particularly by the fact that the court did not accurately articulate our argument in this matter," Cory Johnson of Colvin + Hallett, who represented Dynamic Resources Inc. (DRI), told *Tax Notes* in an email.

"It is unfortunate for taxpayers that the court permitted the department to disavow its own long-standing reasoning and statutory interpretation contained in Industry Guidance addressing activities that the trial court characterized as 'analogous' to those of the

taxpayer,” Johnson stated. “This guidance has been published for over a decade and — despite the department’s contrary position in this case and the court’s conclusion — continues to be published today.”

DRI is based in New York and contracts with retail brands, retailers, and manufacturers to arrange and manage visual displays and in-store marketing promotions throughout the country. The company prepares a manual providing installation and execution details and hires subcontractors in various markets to perform the installation and display work.

The Washington Department of Revenue identified the company as doing business in the state without registering or paying B&O taxes or collecting and remitting retail sales taxes in 2013 and requested that the company complete a business activities questionnaire. After the questionnaire was completed, the DOR concluded that DRI was required to register and conducted an audit on the company.

Determining that DRI was hiring contractors to perform installation and repair work on the company’s behalf, the DOR issued an assessment of \$59,184 for unpaid B&O tax, retail sales tax, penalties, and interest for 2006 through 2012.

DRI paid the assessment after it was upheld on administrative review and sought a refund through the Thurston County Superior Court. The trial court agreed with the DOR that DRI’s installation work was subject to the taxes, and the company appealed.

The appellate court affirmed the trial court, concluding that DRI’s business activities fell within the plain meaning of the state’s definition of “retail sale” set out in RCW 82.04.050(2)(a). The court stated that DRI’s core business is the

installation of personal property, noting testimony by the company’s president on its work.

Rejecting DRI’s argument that the installation must be a permanent attachment to become subject to retail tax and that its activities should be taxed as services and other activities instead of retail sales, the court determined that the 2009 Washington Board of Tax Appeals decision relied on by the company, *Doss Aviation v. Department of Revenue*, held that the state’s definition of retail sale applies to “non-consumable, solid objects that are changed.”

“The type of business activities contemplated by the Board in *Doss* are the precise types of activities performed by DRI,” the court added.

The court also concluded that the company’s activities were retail sales under RCW 82.04.050(2)(b) as decorating new or existing buildings or structures “under, upon, or above real property” and that DRI’s clients fell within the definition of consumer in RCW 82.04.190 because the clients do not use the service for resale in the regular course of business.

Though the court acknowledged discrepancies between the statute and the DOR’s “Guide to Washington State Taxes for Interior Decorators, Designers, And Consultants,” the court concluded that the guide is informal tax guidance that cannot “replace or substitute Washington rules or laws.”

The court also noted that DRI had not offered any evidence that it relied on the guide or sought other guidance from the DOR.

The taxpayer in *Dynamic Resources Inc. v. Department of Revenue* (No. 83281-6-I) was represented by attorneys with Colvin + Hallett. ■