Cited as 1 WTD 1(1986)

BEFORE THE DIRECTOR
OF THE DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition for the Correction of Assessment of . . .	)	FINAL DETERMINATION No. 85-164A Registration No. . . . Tax Assessment No. . . .

(1) RCW 82.32.050 and 82.32.060 - REFUNDS, CREDITS AND OFFSETS - NONCLAIM PERIOD - PROPER AMOUNT DUE - ADDITIONAL TAXES DUE
In order to determine whether additional taxes are due under RCW 82.32.050, any amounts earlier overpaid but now barred by the nonclaim period are not considered in the determination of the proper amount due. Guy F. Atkinson & Co. and Puget Sound Power & Light Co. distinguished.

(2) RCW 82.32.050 and 82.32.060 - REFUNDS, CREDITS AND OFFSETS - NONCLAIM PERIOD
Under the current version of RCW 82.32.050 and RCW 82.32.060, offsets or their economic equivalence are no longer permitted. Guy F. Atkinson & Co. and Puget Sound Power & Light Co. distinguished.

TAXPAYER REPRESENTED BY: . . .

NATURE OF ACTION:

A routine audit of the taxpayers resulted in an audit assessment for unpaid B&O tax and sales tax resulting from transactions involving the leasing of tangible personal property. The auditor did not allow a credit or offset for sales taxes erroneously paid, because the claimed amounts were beyond the four year nonclaim period. In a

determination by Administrative Law Judge Burroughs, the auditor was upheld. The taxpayer appeals that decision to the Director.

FACTS

GARRY G. FUJITA, CHIEF - The facts in this case are not in dispute and the issue before the Department concerns essentially the interpretation of the law as it applies to these given facts.

The taxpayers are the owners of a small closely held corporation (hereinafter referred to as "corporation") which was a duly registered taxpayer with the Department. Sometime in 1977, the taxpayers created a number of unincorporated businesses for the purpose of purchasing equipment; each business would then lease the purchased equipment to the corporation. (These unincorporated businesses will hereafter be referred to as PI, MI and LI.)

Beginning in 1977, the taxpayers did in fact purchase equipment under the business names, or on behalf of the businesses, of PI, MI and LI. These purchases included a payment for the appropriate amount of sales tax associated with the sale. This tax was collected by the retailer and presumably paid over to the state.

PI, MI and LI did not register with the department, apparently due to the taxpayer's lack of understanding that these businesses were taxpayers within the purview of the Revenue Act. The lease payments that these businesses received from the corporation were and are subject to the retailing Business and Occupations Tax (hereinafter referred to as B&O Tax) under RCW 82.04.250. With each lease payment received, there should also have been collected retail sales tax. RCW 82.04.050(4), 82.08.090 and Rule 211.

The taxpayer agrees that there is no valid objection to the B&O and retail sales tax application to the leasing activities in this case. Further, the department does not question that the taxpayers did actually pay sales tax in the amount of $20,761.29. The sales tax was not due from the taxpayers in the initial purchase, because, generally stated, a purchase for resale (with no intervening use) is not a retail sale under the Revenue Act of 1935. RCW 82.04.050(1)(a). This conclusion is further supportable, because the taxpayers, under these facts, do not appear to be consumers for purposes of RCW 82.04.190(1)(a). Thus, the taxpayers owe various excise taxes on the amount of money they received through the companies, PI, MI and LI. On the other hand, they have overpaid sales tax that was not due under RCW 82.08.020, the sales tax imposing statute.

When the taxpayers were audited by the department, the auditor assessed the retailing B&O and the retail sales tax but refused to allow any reduction in that liability due to the retail sales tax

erroneously paid during the earlier years. The auditor found that such could not be taken into consideration, because the nonclaim period had long expired. RCW 82.32.060.

The taxpayers appealed to the Interpretations and Appeals Section for the department. In a decision issued on July 31, 1985, the petition for the correction of the assessment was denied and the audit position sustained. The taxpayers have now appealed to the Director requesting that decision sustaining the audit be reversed.

EXCEPTIONS:

The taxpayers' exceptions essentially evolve around the auditor's comprehension of RCW 82.32.050 and 82.32.060. These sections as relevant are respectively set forth as follows:

> If upon examination of any returns...it appears that a tax or penalty has been paid less than that properly due, the department shall assess...such additional amounts...No assessment or correction of an assessment for additional taxes due may be made by the department more than four years after the close of the tax year, **except** (1) against a taxpayer who has not registered as required by this chapter,...
> (Emphasis added.) (RCW 82.32.050)

> If, upon receipt of an application by a taxpayer for a refund or...upon an examination of the returns or records of any taxpayer,...it is determined by the department that within the statutory period for assessment of taxes...a tax has been paid in excess of that properly due, the excess amount paid within such period shall be credited to the taxpayer's account or shall be refunded to the taxpayer at his option. No refund or credit shall be made for taxes paid more than four years prior to the beginning of the calendar year in which the refund application is made or examination of records is completed.(Emphasis added.) (RCW 82.32.060)

The taxpayers begin their argument with a comparison of the two statutory provisions above set forth. It is argued that a credit is not sought for the sales taxes paid in the years 1977 through 1979. Even though the tax liability for B&O taxes is less than the sales tax amount which was overpaid, no refund is now sought.

The taxpayers theorize that the Department must look at the years in question (i.e. the tax liabilities took place in 1977 through 1979) and the amount of taxes paid during that period to determine if under RCW 82.32.050 any additional taxes were due. In this case, it is

furthered, the department "completely failed to account for the taxes actually paid during those years by these taxpayers in the amount of $20,761.21, which was not due the Department." (Petitioner's Hearing Memorandum, dated April 11,1985, ln. 22, p. 4.)

The taxpayers, thus, are arguing that RCW 82.32.060 (establishing the nonclaim period) is not relevant unless the matter involves a refund or credit. The taxpayers strongly argue that in this case, RCW 83.32.060 is not relevant, because the taxpayers are seeking neither a credit or a refund. It is argued simply that the only necessary consideration is to determine whether any additional taxes are due under RCW 82.32.050. In this case, $20,761.21 have been paid in retail sales tax by the taxpayers and the total B&O and retail sales tax liability created by the leasing businesses for the period is $12,810.00 plus interest. Thus, the result is simple; $12,810.00 is less than $20,761.21 and therefore, there is no additional tax liability under RCW 82.32.050.
As legal support for this analysis, the taxpayers cite us to Guy F. Atkinson Co. v. State, 66 Wn.2d 570, 403 P.2d 880 (1965). This 1965 case dealt with an audit which found that the taxpayer had overpaid various taxes in the amount of $6,518.16. The Tax Commission (now the Department of Revenue) denied the consideration of this credit, because the period within which a claim for refund must have been made had long expired. The matter was litigated and the Superior Court held for the taxpayer. The Commission's appeal to the Supreme Court resulted in a reversal, the result of which was to uphold the audit position.

Though the taxpayer lost in that case, the taxpayers in this case find solace in a discussion that appears at page 576 with regard to whether the waiver by the taxpayer to extend the assessment period under RCW 82.32.050 constituted a waiver by the Commission for the refund claim period under RCW 82.32.060. That discussion is, to wit:

> ...RCW 82.32.050 concerns no payment or underpayment by the taxpayer, while the following section, RCW 82.32.060, deals with overpayment by the taxpayer. There is no correlation between the two statutes (RCW 82.32.050 and 060) and, therefore, whether the plaintiffs signed waivers which waived any statute of limitations defenses they might have in 1958 on any underpayment of tax in the years 1952 and 1953 should have no bearing on the question whether the limitation period had run against the taxpayer on any alleged overpayment of taxes.

The taxpayers conclude from this language that the department must consider the taxes paid in 1977 through 1979, because RCW 82.32.050 and .060 must be read independently of one another. In the words of

the court, "There is no correlation between the two statutes (RCW 82.32.050 and 060)..."

As additional support for this conclusion, in its Memorandum to Director dated October 15,1985, the taxpayers suggest that the case, Puget Sd. Power & Light Co. v. State, 70 Wn.2d 493, 424 P.2d 634 (1967) is dispositive of the matter. This case involved a similar situation as that now before us and as earlier described in the Guy F. Atkinson, supra. Here, the taxpayer had overpaid its tax liability, however, the Commission refused to consider amounts overpaid. The court needed to determine what the legislature meant by the term "properly due."

The Commission argued that the disputed amounts were based on properly taxable receipts, and therefore, it was an amount that was properly due regardless of the total amount (even though greater than the actual tax liability) paid by the taxpayer (on the public utility tax liability) for that period. The court disagreed. At page 497, the court stated as follows:

> If the amount the taxpayer has paid exceeds his proper tax liability for a given period and for a particular tax, certainly no additional assessment therefor could be a sum "properly due." In this case, appellant has paid an amount in excess of the public utility tax properly due from it. The excess portion paid before 1957 is not refundable since more than 2 years had elapsed before he filed his petition for a refund. However, the deficiency assessment for a additional amount, under the analysis set forth above, is not an amount "properly due" from the appellant. Since this amount was not properly due, the statute allows its refund upon petition timely filed. Appellant's petition for refund was filed within 2 years of the October 15, 1959 payment on the deficiency assessments and was, therefore, timely made.

While the taxpayers' arguments insist that this case weighs heavily in a result favorable to them, we are not so persuaded. Cases such as these are not easy cases to decide because of the apparent unfairness in a strict application of the statute. As an administrative agency, however, we are charged with the responsibility of administering the Revenue Act as mandated by the Legislature, regardless of our perception as to the harshness or apparent unfairness of a particular statute, especially where there is no ambiguity. Such relief is the province of the legislative process. We can see no such ambiguity in these statutes, as the following discussion will illustrate.

ISSUES:

ISSUE ONE - Under RCW 82.32.050, does the term "additional taxes due" take into consideration amounts barred by the nonclaim period under RCW 82.32.060?

ISSUE TWO - Under RCW 82.32.050, are offsets permitted in computing whether "additional taxes" are due and if not, are amounts overpaid but barred by RCW 82.32.060 the same thing as an offset or credit?

DISCUSSION:

ISSUE ONE - Under RCW 82.32.050, does the term "additional taxes due" take into consideration amounts barred by the nonclaim period under RCW 82.32.060?

CONCLUSION - In computing what is "properly due" in order to determine whether there are any "additional taxes due," amounts barred by the nonclaim period are not considered.

[1] We do not find Puget Sd. Power & Light Co. v. State, supra., persuasive in resolution of this case, because the court, in determining the "proper amount" due, was asked to consider the amount of the overpayment which was still open and within the nonclaim period. The tax years in question were 1952 through 1957 which involved a deficiency in the amount of $22,942.90. This assessment was paid on October 15, 1959. On October 13, 1961, the taxpayer requested a refund on this amount paid under the assessment. This was clearly within the two year nonclaim period of the statute. It was upon this point that the case was decided.

What this case did not expressly decide or discuss was precisely how the "amount properly due" should be computed. The taxpayers believe this case stands for the proposition that the "amount properly due" includes amounts paid regardless of whether RCW 82.32.060 would permit a refund or credit. At first blush, this case might appear to support the conclusion that the "amount properly due" includes all taxes paid regardless of the nonclaim period. However, after closer scrutiny, the case does not specifically say that barred amounts are included in the calculation nor does it offer any analytical support for that conclusion.

While we could suppose that the court would have reached that conclusion without due regard to the offset language, such a supposition is not rationally supportable when the entire statute is considered as a whole. We believe that the better reasoned analysis to explain why the court would consider amounts barred by the nonclaim period is to conclude the court did so, because of the offset language which expressly granted it that power.

Whether this court would have allowed relief of the type requested by this taxpayer regardless of the specific offset language, we refuse to so speculate. It is the better reasoned conclusion that relief under this set of facts is warranted only where the statute gives authority to consider amounts of overpaid taxes (which would have been otherwise barred by the nonclaim period) to determine what amount was properly due. In other words, the court in that case and under the law at that time had the authority to offset any overpayment from the amounts determined due on properly taxable receipts.

In the case at hand, we find the statute from which our authority must come barren of any ability to offset amounts which are barred by the nonclaim statute. This was the result of amendments adopted by our state legislature subsequent to the holding in the Puget Sd. Power & Light Co., supra. Therefore, to determine the amount properly due under RCW 82.32.050, it is appropriate to determine the proper amount due without consideration of any overpayment from periods now barred by the nonclaim period regardless of how the overpayment is designated (e.g. a credit, refund or offset).

ISSUE TWO - Under RCW 82.32.050, are offsets permitted in computing whether "additional taxes" are due and if not, are amounts overpaid but barred by RCW 82.32.060 the same thing as an offset or credit?

CONCLUSION - Offsets are not permitted in computing "additional taxes" and amounts barred by the nonclaim statute cannot be considered, because to do so would be the economic equivalence of an offset or credit.

[2] We acknowledge that the taxpayers are not arguing that the relief sought is an offset, however the substance of their claim, we believe, is that of an offset. We disagree with the taxpayers' analysis for the reasons as set forth in the following discussion. First, Guy F. Atkinson, supra, and Puget Sd. Power & Light Co., supra, were cases that were interpreting the predecessor to the current versions to RCW 82.32.050 and 060. There is a very important aspect to the predecessor statute; in that version the legislature had provided for offsets. That language is quoted as follows:

> ...no refund or credit shall be allowed with respect to any payment made...more than two years before the date of such application or examination. Where a refund or credit may not be made because of the lapse of said two year period, the amount of the refund or credit which would otherwise be allowable for the portion of the statutory assessment period preceding the two year period may be offset against the amount of any tax deficiency which may be determined by the commission for such preceding period. (Emphasis added.)

The current version of RCW 82.32.060 does not speak of offsets. In fact, a review of the statutory evolution shows that in 1979 when the legislature amended this section to extend the nonclaim period to four years, it deleted the offset language. The successor to, and relevant version of, RCW 82.32.060 deleted the offset language entirely and is quoted as is necessary:

> ...No refund or credit shall be made for taxes paid more than four years prior to the beginning of the calendar year in which the refund application is made or examination of records is completed.

Blacks Law Dictionary provides relevant definitions of the operative terms in this statute. These are set out as follows:

> CREDIT: ...That which is due to a person.
>
> OFFSET: A deduction;...a contrary claim or demand by which a given claim may be lessened or canceled.
>
> DEDUCTION: ...the part taken away; abatement...
>
> ABATEMENT: A reduction, a decrease, or a diminution.

The taxpayers have gone to great lengths to distinguish their computation from one that involves the use of a credit. We are not convinced that "the amount due" under RCW 82.32.050 which includes a reduction for an overpayment from a prior period is not the same as requesting an offset.

As defined, an offset is the same thing as a deduction or abatement. These words mean that there is a reduction or decrease occurring. To determine the "amount properly due," one must begin with the total tax due and compare that to the amount of the tax paid. The only way that comparison can have any meaning is to subtract (e.g. reduce, decrease) the amount of tax paid from the tax liability. Thus, to consider the claims now barred by the nonclaim period is inescapably the result of an offset. It is clear that the legislature intended to eliminate the offset as a method of determining tax liability. We so hold.

Further, to argue that reduction of the amount due should take into consideration the amounts barred by the nonclaim period is to disregard the concept of a credit. As above indicated, a credit means that which is due to the taxpayers. To reduce the amount of tax liability by the amounts barred by the nonclaim period is to recognize that some amount is due to the taxpayers. To find in this fashion would be an internal inconsistency requiring a total disregard

for the true economic substance intended by RCW 82.32.060; to permit the recognition would be to provide the equivalent economic benefit of an offset or credit which the statute clearly prohibits.

To summarize, first, we find that Guy F. Atkinson v. State, supra. is distinguishable, because it dealt with the taxpayer's attempt to "bootstrap" a waiver of the period of assessment into a waiver of the nonclaim period. The court stated that the two code provisions were unrelated. We agree so far as the court was dealing with the issue of whether a waiver of one was the waiver of the other. To the extent that this rationale should apply to the determination of the proper amount due, we refuse to so hold.

Secondly, Puget Sd. Power & Light Co. v. State, supra., is not applicable, because it did not have precisely before it the question of whether a claim barred by statute could be considered in determining the "amount properly due." Secondly, it is not persuasive, because even if it did have the question before it, the statute then allowed for offsets, a character no longer found in the version of RCW 82.32.060 applicable in this case.

Finally, we refuse to draw a line where none is required. The distinction between what the taxpayers are requesting and a credit or an offset is non-existent.

DECISION AND DISPOSITION:

We find that Determination 85-164 is correct in the analysis therein set forth. The taxpayer's petition is hereby denied and the assessment sustained. Tax Assessment No. . . . in the unpaid amount of $19,255, plus additional interest through August 19, 1985 in the amount of $743, for a total sum of $19,998 is due for payment by August 4, 1986. Interest from August 19, 1985 through the new payment date is hereby waived.

DATED this 15th day of July 1986.

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