Cite as 13 WTD 203 (1993).

BEFORE THE BOARD OF TAX APPEALS
STATE OF WASHINGTON

SUNRISE FIBERGLASS ENGINEERING, INC., Appellant,	Docket No. 41913
v.	Re: Excise Tax Appeal
STATE OF WASHINGTON DEPARTMENT OF REVENUE, Respondent.	FINAL DECISION

This matter came before the Board of Tax Appeals (Board) for an informal hearing on September 22, 1992. George C. Mastrodonato, Attorney, appeared for Appellant, Sunrise Fiberglass Engineering, Inc. (Sunrise). Marguerite M. Bauer, Administrative Law Judge, appeared for Respondent, Department of Revenue (Department). The parties submitted post-hearing briefs, the last of which was received on November 10, 1992.

This Board heard the testimony, reviewed the evidence, and considered the arguments made on behalf of both parties. This Board now makes its decision as follows:

ISSUES

The issue in this appeal is whether the four-year statute of limitations on tax assessments, RCW 82.32.050, operates to bar an out-of-period assessment made against Sunrise with respect to sales taxes actually collected from purchasers but not remitted to the Department. The Department contends that the statute does not bar the assessment because: (1) sales taxes actually collected are to be held in trust until paid to the Department, RCW 82.08.050; (2) the statute of limitations is tolled by Sunrise's fraud or misrepresentation of a material fact; and (3) Sunrise is equitably estopped from raising the bar of the statute of limitations because of its fraud and misrepresentation. The Department's position is embodied in WAC 458-20-230. Sunrise contends that the four-year statute bars the assessment because: (1) the Department has not shown fraud or misrepresentation such as would toll the statute; and (2) WAC 458-20-230, in creating an exception to the four-year limitation not authorized by statute, amounts to an ultra vires act and is therefore invalid. We find for the Department.

FACTS

Sunrise is a corporation which manufactures fiberglass green-houses in Shelton, Washington. The Department audited Sunrise for the period January 1, 1985, through December 31, 1989. The audit commenced in March 1990, and was completed in October 1990. The assessment in question was issued in December 1990. It covered Sunrise's calendar year 1985 retail sales, the tax liability for which had been substantially understated.[1] The auditor assessed the difference between the amount of sales taxes collected and the amount reported, relying on Sunrise's invoices to determine the amount collected from customers. Sunrise did not dispute these amounts.

The Department's auditor originally planned to audit Sunrise for the period 1986 to 1989. While auditing Sunrise's records for 1986, he discovered that Sunrise had substantially under-reported the amount of sales taxes actually collected. He then looked at the records for 1985, uncovering the same pattern of underreporting. He examined all sales invoices in 1985 and 1986. He discovered that Sunrise would properly account for and report sales taxes collected on the first three or four invoices each month. Thereafter, for the rest of the month, Sunrise would report the amounts received under the "manufacturing" B&O tax category, thus representing that the sales were made out-of-state and free of sales tax.

Sunrise had a troubled history of compliance with the state's revenue laws. It was delinquent in reporting and paying taxes in almost all cases in 1985. On at least one occasion, the Department was required to issue a warrant (RCW 82.32.210) to enforce collec-tion of tax obligations. The Department's auditor was of the opinion from an examination of Sunrise's books and records that Sunrise was in some financial difficulty with other creditors. During the audit, there was some delay in obtaining records, but overall, the Department's auditor reported satisfactory cooperation from Sunrise. Subsequent to the assessment, Sunrise entered into an agreement for installment payment of the assessment, which was not complete as of the date of the hearing.

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[1] During 1985, Sunrise collected $23,463 in sales taxes from its Washington retail customers, but reported and remitted only $2,081, approximately 10 percent of the total taxes collected. Sunrise was late paying even these amounts. The assessment for 1985 amounted to $30,702, including interest.

The assessment was upheld by the Department's Interpretations and Appeals Division. Sunrise timely appealed the Department's final determination to this Board.

ANALYSIS

I.

The legal question before us is primarily one of statutory construction. Did the Legislature, in enacting the four-year statutory limitation on issuance of tax assessments (RCW 82.32-.050), intend to exclude from operation of the statute unremitted sales taxes being held in trust for more than four years? In order to determine legislative intent, we must first examine the act containing the limitation provision, its underlying purposes and policies, and the remedial scheme developed for enforcement of the rights given by the act.

We begin our analysis by setting out the relevant statutes and administrative rule. The statute outlining the seller's responsi-bilities regarding sales tax collection, RCW 82.08.050, provides in part: "The tax required by this chapter, to be collected by the seller, shall be deemed to be held in trust by the seller until paid to the department . . . ".

The sales tax is designed to be paid by the purchasing public and collected by the seller. RCW 82.08.050; Kitsap-Mason Dairy-men's Ass'n v. Tax Comm'n, 77 Wn.2d 812, 467 P.2d 312 (1970).

> Inherent in RCW 82.08 is the fact that taxes collected in the name of the state are not property of the seller. It is a misdemeanor to convert taxes collected to one's own use. RCW 82.08.050. The integ-rity of the entire taxing system demands that funds collected as taxes be remitted to the state.

Id., 77 Wn.2d at 817.

The Department enforces taxpayer compliance by, among other devices, issuing tax assessments for unpaid taxes.[2] This is the first step in the summary collection of taxes, a process which is designed to accomplish the speedy and efficient collection of revenues owing the government. The state has a strong interest in speedy and efficient collection of revenues by means of summary collection procedures. Peters v. Sjoholm, 95 Wn.2d 871, 631 P.2d 937 (1981). Nevertheless, the Legislature has limited the time frame for use of these summary procedures. RCW 82.32.050(3) provides:

> No assessment or correction of an assessment for additional taxes, penalties, or interest due may be made by the department more than four years after the close of the tax year, except (a) against a taxpayer who has not registered as required by this chapter, (b) upon a showing of fraud or of misrepresentation of a material fact by the taxpayer, or (c) where a taxpayer has executed a written waiver of such limitation.

The purpose of this limitation is the same as general statutes of limitation: (1) the policy of repose--instilling a measure of certainty and finality into one's affairs, and (2) protection against stale claims which are more likely to be spurious and consist of untrustworthy evidence than are fresh claims. Kittinger v. Boeing Co., 21 Wn. App. 484, 585 P.2d 812 (1978).

In aid of its collection powers, the Department has issued WAC 458-20-230 (Rule 230), which restates the three exceptions listed above. In addition, the rule contains a fourth exception, worded as follows: "(4) Sales tax collected by a seller upon retail sales. Such tax shall be deemed to be held in trust until paid to the department. (RCW 82.08.050.)"

This rule had its genesis in a 1966 Excise Tax Bulletin, ETB 303.32.230 (ETB 303), a summary of a 1966 decision of the Department's predecessor, the Tax Commission. As explained in ETB 303:

> The fourth exception in the rule . . . embodies the principles set out in RCW 82.08.050 which states that a seller who collects Sales Tax is deemed to hold it in trust for the state until collected by the Tax Commis-sion. The Commission held that the "trust"

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[2] In addition to issuing an assessment, the Department may proceed directly in court for collection of the tax. RCW 82.32-.240. The Department prefers the assessment process because it is swifter and more efficient than resort to the courts in the first instance.

principle stated in this statute legally establishes an implied fourth exception to the four-year statute of limitations with respect to Retail Sales Tax collected by the tax-payer.

Rule 230 in its current form has been in place since 1965. Nevertheless, it is well settled that the Department may not extend by rule a limitations period beyond that authorized by statute. Pacific Northwest Bell Tel. Co. v. Department of Revenue, 78 Wn.2d 961, 481 P.2d 556 (1971). An erroneous administrative construction placed on a statute is not controlling merely because of subsequent legislative inaction. Kitsap-Mason Dairymen's Ass'n, supra.

We next note the general rules of statutory construction applicable to statutes of limitation. In the case of governmental claims, statutes of limitation are strictly construed in favor of the government. 51 Am. Jur. 2d Limitation of Actions § 50 (1970). Statutes of limitation limiting the time for collection of taxes are strictly construed in favor of collection. State Dep't of Revenue v. Alaska Pulp America, 674 P.2d 268 (Alaska, 1983). The principle of strict statutory construction does not mean that the usual rules of statutory construction should be ignored. Statutes should be construed to effectuate the legislative purpose, and unlikely, strained, or absurd results should be avoided. Cherry v. Municipality of Metro. Seattle, 116 Wn.2d 794, 808 P.2d 746 (1991). Nevertheless, exceptions to statutes of limitation should not be extended to cases not clearly within the statutory language. 51 Am. Jur. 2d Limitation of Actions §§ 50, 138.

II.

The Department, relying on Rule 230, first argues that the sales tax trust fund statute, RCW 82.08.050, creates a fourth "implied exception" to the four-year statute, RCW 82.32.050. The Department reasons that because sales taxes collected by the seller remain "trust funds" until remitted to the Department, applying the statute of limitations "would be an absurd result contrary to clear legislative intent to afford greater protection of these funds, and would render the provision that these monies be 'held in trust by the seller until paid to the department' void and meaningless." Respondent's Reply Brief, at 4. The Department adds that sales tax funds actually collected by a seller are not dischargeable in bankruptcy. In re Shank v. Department of Revenue, 792 F.2d 829 (9th Cir. 1986).

There are several problems with the Department's argument. First, as pointed out by Sunrise, the trust fund statute, RCW 82.08.050, is a general statute dealing with sales tax collection, reporting, and remittance requirements, whereas RCW 82.32.050 is a specific statute which deals with limitation periods for tax assessments. A specific statute takes precedence over a general statute. State v. Q.D., 102 Wn.2d 19, 685 P.2d 557 (1984). Second, as also pointed out by Sunrise, the express mention of certain exceptions to the statute of limitations implies the exclusion of other exceptions under the maxim "express mention of one thing implies the exclusion of others." See In re Eaton, 110 Wn.2d 892, 757 P.2d 961 (1988). Third, merely because funds are held in trust does not necessarily exempt actions for the recovery thereof from statutes of limitation. Viewcrest Coop. Ass'n v. Deer, 70 Wn.2d 290, 422 P.2d 832 (1967). Fourth, the mere fact that sales tax monies are held in trust for the state and remain owing does not compel the conclusion that the Legislature intended to provide an additional exemption from operation of the four-year statute. We can perceive of no reason why sales taxes which are owing the state should necessarily be treated differently from any other taxes which are owing the state insofar as application of the statute of limitations is concerned. The important public policies of repose and protection against stale claims are as applicable to sales tax trust funds as to, say, underpaid B&O taxes, RCW 82.04. If the Legislature had intended to automatically exempt sales tax trust funds from the operation of RCW 82.32.050 so as to impose a liability unlimited as to time, it could have easily done so. We will not extend an exception to a statute of limitation which is not within the statutory language.

Finally, we fail to see how protection of sales tax trust funds from discharge in bankruptcy bears upon the statute of limitations issue. Bankruptcy policy is set by the United States Congress, and has no relation to the State Legislature's policies underlying statutes of limitations. The purpose of the bankruptcy statutes is to give debtors a fresh start, not to provide repose or protect against stale claims.

For these reasons, we must reject the Department's argument that the sales tax trust fund statute, RCW 82.08.050, without more, automatically creates a de jure fourth "implied exception" to the operation of the four-year statute of limitations generally appli-cable to tax claims of the state.[3]

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[3] Our rejection of the Department's argument based on Rule 230 does not compel the conclusion that Rule 230 is in excess of statutory authority. To the extent that the rule sets out the Department's position on sales tax trust funds, it operates as "fair warning" to sales tax trustees who might claim ignorance of the consequences of their breach of trust. Under our construction of RCW 82.32.050, infra, "garden variety" failure to

III.

The Department next argues that the tax claim statute of limitations is in any event tolled by Sunrise's fraud or misrepre-sentation of a material fact. In the Department's view, Sunrise, as statutory trustee of sales tax funds collected by it, stands in a fiduciary relationship to the state, and is strictly liable to properly account for and timely pay over sales taxes collected on the state's behalf. The failure of Sunrise to do so amounts, as a matter of law, to "fraud or . . . misrepresentation of a material fact" within the meaning of those terms as used in RCW 82.32.050. Sunrise responds that the burden is on the Department to demonstrate actual fraud or misrepresentation before the "fraud" exception to RCW 82.32.050 is invoked, which burden the Department has not met.

We agree with the primary thrust of the Department's argument. We find that the unexcused[4] failure of a taxpayer to properly account for and timely pay over sales tax funds collected from customers as a matter of law tolls the statute of limitations until the Department discovers, or in the exercise of reasonable diligence could have discovered, the sales tax trustee's breach of duty.

Ordinarily, mere failure to disclose a material fact does not constitute misrepresentation or fraudulent concealment. However:

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remit sales taxes actually collected from a seller's customers would invariably toll the statute of limitations.

[4] We do not agree with the Department that failure to properly account for and pay over sales tax trust funds <u>always</u> amounts to fraud or misrepresentation. As noted, <u>infra</u>, trustees are held to high standards of accountability, and may be strictly liable to render a full and accurate accounting of trust funds, but we have been cited no authority, nor have we discovered any in our own research, which would stand for the proposition that where a trustee is prevented from properly accounting for and paying over trust funds by events which are beyond the control of the trustee--for example, natural disaster or war--such failure constitutes fraud or misrepresentation. We therefore use the term "unexcused failure of the trustee" to denote those circumstances where fraud or misrepresentation will be inferred.

> [I]f the fraud itself is secret in its nature and such that its existence cannot be readily ascertained, or if there are fiduciary or confidential relations between the parties, there needs to be no evidence of a fraudulent concealment other than that implied from the transaction itself. Even mere failure to reveal may be fraudulent when there is a duty to reveal.

51 Am. Jur. 2d Limitation of Actions § 149 (1970). (Citations omitted.) The seller, as trustee of sales tax funds collected from purchasers, stands in a fiduciary relationship with the state.[5] A fiduciary relationship imposes upon the fiduciary the duty to make true statements and disclose all material facts. There is no privilege of nondisclosure, and if a fiduciary fails to make full disclosure of all material facts, the nondisclosure has the effect of a material misrepresentation. 37 Am. Jur. 2d Fraud and Deceit §§ 51, 149 (1968). As stated in Burien Motors, Inc. v. Balch, 9 Wn. App. 573, 577, 513 P.2d 582 (1973):

> If one has a duty to know the truth, it is no defense that he was honestly mistaken. A fiduciary

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[5] Sunrise, although recognizing the existence of a statutory trust responsibility, argues that the holder of state sales tax funds is not a fiduciary for purposes of application of the statute of limitations to cases of fiduciary fraud. It cites Saks & Co. v. Comptroller of the Treasury, Maryland Tax Court No. 368 (1989 WL 112966, decided September 27, 1989), for the proposition that the statutory designation of a seller as a trustee does not establish a fiduciary standard. The Saks case dealt only with the duty of the seller to collect sales taxes. It is not authority for estab-lishing the duties of the seller once it has actually collected sales taxes from its customers. In addition, Sunrise argues that in order to establish a fiduciary relationship upon which to base a claim of fraud, a relationship must exist which would induce the beneficiary to relax the vigilance it would normally exercise, citing Hood v. Cline, 35 Wn.2d 192, 212 P.2d 110 (1949). Because the Department has audit and enforcement programs designed to insure compliance on the part of sellers, Sunrise argues that no relationship exists which would induce the Department to relax its vigilance. We reject this argument. The Department depends upon taxpayers--indeed it to a large extent "trusts" them--to properly account for and pay over sales taxes. It is not possible, wise, or even tolerable to audit every single taxpayer every year. We therefore find that the normal vigilance of the Department would not induce it to conduct annual in-person, full-blown audits of all sales tax collectors.

> such as an attorney must exercise reasonable care. He must protect his client's interest out of a sense of loyalty, good faith, and duty to exercise reasonable care. . . . The duty is similar to the duty to disclose imposed upon a trustee who must disclose all material facts concerning the transaction the trustee knows or should know. Restatement (Second) of Trusts § 170(2) (1959).

A trustee owes to the beneficiary of the trust the highest degree of good faith, diligence, loyalty, and integrity; a trustee must act solely in the beneficiary's interest. Esmieu v. Schrag, 88 Wn.2d 490, 498, 563 P.2d 203 (1977); In re Estate of Drinkwater, 22 Wn. App. 26, 30-31, 587 P.2d 606 (1978). A trustee cannot deal with the trust property for its own profit or claim any advantage by reason of its relation to it, either directly or indirectly. Tucker v. Brown, 20 Wn.2d 740, 768, 150 P.2d 604 (1944); In re Estate of Eustace, 198 Wash. 142, 147, 87 P.2d 305 (1939).

Thus, fraud or misrepresentation may be inferred in the case of unexcused failure of a trustee to disclose and pay over funds collected on behalf of another. It is not necessary to demonstrate all the elements of "actionable fraud"[6] in order to fit within the definition of "fraud or . . . misrepresentation of a material fact" in the case of a trustee's unexcused clear breach of a fiduciary duty to account for and turn over trust funds collected on behalf of another.

Our conclusion is buttressed by consideration of the cases dealing with the "fraud" exception to the general statute of limitations, RCW 4.16.080.[7] As noted earlier, the policies under-lying the tax claim statute are the same as those

[6] The elements of "actionable fraud" are: (1) a representa-tion of an existing fact, (2) its materiality, (3) its falsity, (4) the speaker's knowledge of its falsity or ignorance of its truth, (5) the speaker's intent that it should be acted on by the person to whom it is made, (6) ignorance of its falsity on the part of the person to whom it is made, (7) the latter's reliance on the truth of the representation, (8) the person's right to rely on it, and (9) the person's consequent damages. Farrell v. Score, 67 Wn.2d 957, 958-59, 411 P.2d 146 (1966).

[7] RCW 4.16.080 provides, in part: "The following actions shall be commenced within three years: . . . [a]n action for relief upon the ground of fraud, the cause of action in such case not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud . . .".

underlying statutes of limitation in general. There is no reason to expect that the Legislature had different policies in mind in enacting the two statutes. Because the tax claim statute and the general statute relate to the same subject matter--limitation of actions--they are in pari materia and should be construed in a similar manner. Kucher v. Pierce County, 24 Wn. App. 281, 600 P.2d 683 (1979).

The "fraud" exception to the operation of the statute of limitations is most commonly invoked where the court has found a constructive trust.[8] In the case of a constructive trust, it is not necessary for the beneficiary of the trust to show it was deprived of its property through "actionable fraud." Viewcrest Coop. Ass'n, supra. "When an agent violates his fiduciary duty by fraudulently misappropriating the funds of his principal, then an action to recover the funds is grounded upon fraud within the meaning of the statute of limitations." Id., 70 Wn.2d at 295.

We therefore conclude that the term "fraud or . . . misrepre-sentation of a material fact", as used in RCW 82.32.050, may be inferred from the unexcused failure of a taxpayer to properly account for and timely remit sales tax trust funds collected from purchasers. A showing of "actionable fraud" is not required in order to toll the statute of limitations.

IV.

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[8] The law imposes a constructive trust whenever one acquires property in circumstances which render it unconscionable for the holder to retain the beneficial interest in the property. 76 Am. Jur. 2d Trusts § 200 (1992); In re Estate of Peterson, 12 Wn.2d 686, 123 P.2d 733 (1942). Unjust enrichment is a common test of unconscionability. See, e.g., Ryan v. Plath, 18 Wn.2d 839, 140 P.2d 968 (1943); Proctor v. Forsythe, 4 Wn. App. 238, 480 P.2d. 511 (1971). Here, allowing Sunrise to retain funds collected on behalf of the state would result in unjust enrichment of the tax-payer at the expense of the state. The taxpayer is not entitled under any circumstances to retain sales tax funds collected on behalf of the state. Kitsap-Mason Dairymen's Ass'n, supra. Even if the Legislature had not imposed a specific statutory trust responsibility on sellers, it is clear that a court would find a constructive trust in the case of a seller retaining sales tax funds collected from its customers. It is therefore appropriate to turn to the law of constructive trusts for guidance on the issue of statutes of limitation. When a constructive trust is found, the holder of the funds is treated as if it had been a trustee for the beneficiary from the time it began to hold the funds unconscion-ably. Huber v. Coast Inv. Co., 30 Wn. App. 804, 638 P.2d. 609 (1981).

Sunrise argues that the Department bears the burden of establishing by clear, cogent, and convincing evidence[9] the existence of fraud on the part of Sunrise. We agree. Fraud is never presumed, and must be proven by clear, cogent, and convincing evidence. Beckendorf v. Beckendorf, 76 Wn.2d 457, 457 P.2d 603 (1969).

We find that the Department has met this burden, at least as a prima facie matter. In this case, Sunrise, as trustee for retail sales taxes, was a fiduciary. It knew, or should have known, and should have disclosed the proper amount of retail sales taxes collected from its customers. Sunrise has superior knowledge of this amount. The Department obviously has no way of knowing the amount of retail sales taxes Sunrise actually collected from its customers. Sunrise should have remitted the proper amount of sales taxes to the Department on a timely basis. The Department established that not only did Sunrise consistently underreport by a wide margin the amount of sales taxes it collected, it also was consistently late in remitting the taxes it did report. Sunrise's actions amounted to an egregious breach of its fiduciary respon-sibilities, the net result of which was that Sunrise had the beneficial use of funds belonging--not merely owing--to the state. Sunrise's actions amounted to a classic out-and-out misappropria-tion of sales tax trust funds. Under these circumstances, we find that Sunrise breached its fiduciary duty in such a manner as to constitute a prima facie case of "fraud or of misrepresentation of a material fact" as that term is used in RCW 82.32.050.

Sunrise presented no evidence in rebuttal. Rather, it relies on the fact that the Department's auditor testified at the hearing that he found no "irrefutable evidence" of intent to defraud the state of sales taxes collected, and did not recommend the imposition of the tax evasion penalty (RCW 82.32.050). We do not take such a sanguine view of the auditor's testimony. The auditor's opinion of Sunrise's intent was given in the context of "actionable fraud", not a breach of fiduciary responsibilities. In the auditor's view of fraud, "irrefutable evidence" would have consisted of a statement from Sunrise admitting actual intent to defraud. Such a showing is not required. All that need be shown

[9] "Clear, cogent and convincing" evidence means a quantum of proof which is less than "beyond a reasonable doubt" but more than a "mere preponderance of the evidence". Davis v. Department of Labor and Industries, 94 Wn.2d 119, 127, 615 P.2d 1279 (1980). It is the quantum of evidence necessary to convince the trier of fact that the ultimate fact in issue is "highly probable". In re Sego, 82 Wn.2d 736, 739, 513 P.2d 831 (1973).

are circumstances from which a trier of fact may infer fraud--a showing which the Department made in abundance. The auditor did not assess the evasion penalty because, among other reasons, he had concern about Sunrise's ability to pay the assessment in any event, the evasion penalty would have likely delayed collection, and would not likely have been cost effective in purely economic terms. We thus place no significance on the auditor's decision to refrain from imposing the evasion penalty.

V.

Under the "fraud" exception to the general statute of limita-tions, in the case of "fraud" of a trustee or one who stands in a fiduciary relationship with another, the statute is tolled until discovery of the wrong. Arneman v. Arneman, 43 Wn.2d 787, 264 P.2d 256 (1953); Viewcrest Coop. Ass'n, supra, and cases cited therein. Because the policies underlying the general statute of limitations are similar, we adopt the same rule with respect to the excise tax statute of limitations. Under RCW 82.32.050, the Department may issue an assessment within four years from the end of the year it discovered, or in the exercise of due diligence could have discovered, sales taxes which were collected from purchasers but were not remitted to the Department.

Sunrise argues that this creates an unlimited statute of limitations. To be sure, where the Department never audits a sales tax trustee, our construction of the statute might result in what is in effect an unlimited statute of limitations. However, Sunrise has not demonstrated that an unlimited statute of limitations is unconstitutional or even so unwise as to be outside the bounds of legislative contemplation. Absent such a showing, we must reject Sunrise's argument.

DECISION

The Determination of the Department of Revenue is sustained.

DATED this _____ day of __________________, 1993.

BOARD OF TAX APPEALS

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MATTHEW J. COYLE, Chair

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LUCILLE CARLSON, Vice Chair

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Pursuant to WAC 456-10-755, you may file a petition for reconsideration of this Final Decision. You must file the petition for reconsideration with the Board of Tax Appeals within ten days of the date of mailing of the Final Decision. You must also serve a copy on all other parties. The filing of a petition for reconsideration suspends the Final Decision until action by the Board. The Board may deny the petition, modify its decision, or reopen the hearing.