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BEFORE THE INTERPRETATION AND APPEALS SECTION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition For B&O Tax Credits for New Employees of . . .	D E T E R M I N A T I O N No. 87-104 Registration No. . . .

[1] **RULE 240:** RCW 82.62.020 -- B&O TAX -- CREDITS -- NEW EMPLOYEES -- ELIGIBLE AREA -- APPLICATION.
A business meeting the requirements of Chapter 82.62, which allows B&O tax credits for hiring the unemployed in eligible areas, must apply for the tax credits prior to hiring the new employees.

[2] STATUTES -- CONSTRUCTION -- "MUST" -- MEANING.
The word "must" in a statute imposes a mandatory duty.

[3] **RCW 82.32.300:** B&O TAX -- ADMINISTRATION OF -- CREDITS -- DUTY TO INFORM.
Although the Department attempted to inform businesses of the B&O tax credits available under Chapter 82.62, the Department has no discretion to grant credits to a business who failed to make a timely application because it was unaware of the credits.

[4] **RULE 240:** B&O TAXES -- CREDITS -- GROSS INCOME OF THE BUSINESS -- HARDSHIP.
The Department has no discretion to grant B&O tax credits to a business who failed to make a timely application, even though the business is operating at a loss and needs the credits to be able to retain the new employees.

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.

TAXPAYER REPRESENTED BY: . . .

DATE OF HEARING: January 14, 1987

NATURE OF ACTION:

The taxpayer, a Washington business, protests the denial of B&O tax credit on new employees.

FACTS AND ISSUES:

Frankel, A.L.J.--The taxpayer is a Washington lumber milling business . . . . It registered with the Department in 1973. At the beginning of 1986, it had thirty-six employees. On July 24, 1986, it hired thirty-four new employees to work a second shift. Prior to hiring the new employees, the taxpayer was not aware that the legislature had enacted ESHB 1754 in the 1986 session. (The Act allows tax credits for eligible business projects.)

On October 7, 1986, the taxpayer submitted an application for B&O tax credit on new employees. The taxpayer's letter stated:

> Just recently we learned of your B&O Tax Credit Program for employers who increase the number of employees 15% or more. Imagine how disappointed we are to learn from the paperwork we were able to secure, that we should have applied before we hired the additional people. In July we added another shift which almost doubled our employee count. This should qualify us except we did not know about the program until long after we had made this move.
>
> The best information we have is that the reason we were not notified about this program is because we are on an annual reporting status and that group of employers evidently was not considered to be potential applicants.
>
> From 1975 through 1982 this company leased the entire business to a firm from the east. It was this status, we're certain, that caused the Department of Revenue to change us to annual reporting instead of quarterly reporting. Since April, 1983, we have been operating entirely clear

> of lease arrangements but have never been changed back to quarterly reporting.
>
> We are asking that you consider our application at this time, especially in view of the fact our county is at 18.4% unemployment and we as employers need all the incentive and help possible. This program could help us to extend the extra shift indefinitely, and keep this number of people working. Needless to say, this is a boon to the community economic picture.

The Department denied the application because the new employees were hired prior to the date of application. The excise tax examiner relied on language in the Act which states that the application for tax credits must be made before the actual hiring of qualified employment positions.

The taxpayer protests the denial for the following reasons:

> 1) It complied with the spirit of the law and the state got what was wanted--new employees in a distressed area.
>
> 2) The state should have notified taxpayers who were on annual reporting, as itself, of the credit program earlier. It would have started the night shift earlier and would have been able to submit the application prior to hiring the new employees.
>
> 3) The taxpayer's business is losing money and it is only keeping the second shift on because of the expectation of receiving the B&O tax credit (approximately $13,000). The credit would help the taxpayer reduce losses and allow the employees to remain employed.

DISCUSSION:

[1] Engrossed Substitute House Bill No. 1754, Chapter 116, Laws of 1986, was enacted by the legislature to encourage the hiring of the unemployed in "eligible areas." The law is codified in RCW 82.62. An eligible area is a county in which the average level of unemployment for the three years before the year in which an application was filed exceeded the average state unemployment by twenty percent. RCW 82.62.010(3).

The taxpayer is located in an "eligible area" and did hire new employees who had been unemployed. The taxpayer did not apply for the tax credits, though, before the new employees were hired.

The legislature provided that "[a]pplication for tax credits under this chapter must be made before the actual hiring of qualified employment positions." RCW 82.62.020. We agree with the excise tax examiner that this language is mandatory and controlling.

The Department is to effectuate legislature intent to the fullest extent possible. Thurston County v. Sisters of Charity of House of Providence, 14 Wash. 264 (1896). Where the legislature grants an exemption from taxation, the Department has no authority to enlarge the exemption by construction, since the legislature has presumably granted in express terms all that it intended to grant. Norwegian Lutheran Church v. Wooster, 176 Wash. 581 (1934).

In this case, the Act did not provide the incentive for the taxpayer to hire the new employees, because it hired them before it was aware of the Act. We would have to find that the legislature also intended to reward those employers who had hired new employees in eligible areas and to provide an incentive for the employer to retain those employees. We would also have to find that the legislature did not mean what it said, when it said applications must be submitted before the actual hiring of the qualified employment positions. We simply do not have that discretion.

[2] "A mandatory provision in a statute is one which, if not followed, renders the proceeding to which it relates illegal and void; a directory provision is one the observance of which is not necessary to the validity of the proceeding." Spokane County ex rel. Sullivan v. Glover, 2 Wn.2d 162, 169 (1940), citing 59 C.J. 1072 § 630. In Spokane County, the court considered whether the word "shall," in a statute imposed a nondiscretionary duty. The court noted that as a general rule "shall" was imperative and imposed a duty, while "may" was generally used to confer discretion. The court found the word "shall" as used in the tax code was used in both the imperative and the permissive sense.

In this case, though, the legislature used the word "must." We know of no case in which the court found the use of the word "must" imposed a discretionary duty. Webster's dictionary defines must as "an imperative duty." We find that

RCW 82.62.020 imposes an imperative duty on a taxpayer to apply for tax credits prior to hiring the qualified employees to receive the credit.

Although this result may seem harsh, where the legislature intends a procedural step to be mandatory, we have no authority to make an exception. See, e.g., Seattle v. Reed, 6 Wn.2d 186 (1940) (Court shall dismiss appeal where appellant fails to proceed with appeal within the time provided by statute; use of "shall" is mandatory.)

[3] The administration of the B&O tax is vested in the Department of Revenue. RCW 82.32.300. The Department tries to provide accessible taxpayer information and to inform persons in this state of changes in the law relating to taxes. There are 17 regional offices around the state to assist taxpayers and answer questions without charge. The Department also maintains an office of taxpayer information and education.

The Department did attempt to inform businesses of the B&O tax credits available for eligible business projects. Notification was placed in the Washington Register, in the CPA's quarterly, and in the April 1986 issue of Tax Topics which goes to attorneys and accountants in the state.

The Department issued press releases to the media, particularly in eligible areas. It also included information about the credits with the March and June returns which went to approximately 270,000 taxpayers. Even though mailings were not specifically sent to businesses filing annual returns, such businesses often use accountants or attorneys who were sent notices and reasonably could be assumed to have notified their clients of the credits.

In the final analysis, though, that the Department is not required to make sure every business knows its tax obligation before it can assess taxes, interest or penalties. The ultimate responsibility for registering with the Department and properly reporting taxes rests on persons in businesses. Likewise, the Department is not required to grant a credit in this case because it did not inform the taxpayer directly of the legislation providing for B&O credits.

[4] Finally, we are unable to grant relief because the taxpayer is operating at a loss and needs the credit to allow it to retain the second shift. Although the state might save more money in the long run by giving the taxpayer the credit so that those employees could stay employed, we have no

authority to grant relief for such a reason or because of economic hardship.

Subject to narrowly circumscribed exceptions, Washington's B&O tax is calculated on the "gross income of the business." RCW 82.04.290; O'Leary v. Department of Revenue, 105 Wn.2d 679, 681 (1986). The "gross income of the business" is defined by RCW 82.04.080 as a tax on the gross income of the business costs:

> "Gross income of the business" means the value proceeding or accruing by reason of the transaction of the business engaged in and includes gross proceeds of sales, compensation for the rendition of services, gains realized from trading in stocks, bonds, or other evidences of indebtedness, interest, discount, rents, royalties, fees, commissions, dividends, and other emoluments however designated, all without any deduction on account of the cost of tangible property sold, the cost of materials used, labor costs, interest, discount, delivery costs, taxes, or any other expense whatsoever paid or accrued and without any deduction on account of losses.

Whether a profit is realized by the business is immaterial. See, e.g., Budget Rent-A-Car v. Department of Revenue, 81 Wn.2d 171, 173 (1972).

We are sorry the result of this Determination could not be more favorable. The taxpayer provided letters from the local Chamber of Commerce and the Port of . . . supporting the application. Both letters applauded the taxpayer for helping the economy in the community and stressed the economic problems the area was having. As discussed above, though, we find this is a case where the mandatory language of the statute is controlling.

DECISION AND DISPOSITION:

The taxpayer's petition is denied.

DATED this 7th day of April 1987.