

Cite as Det. No. 09-0090, 29 WTD 5 (2010)

BEFORE THE APPEALS DIVISION  
DEPARTMENT OF REVENUE  
STATE OF WASHINGTON<sup>1</sup>

In the Matter of the Petition For Refund	)	<u>D E T E R M I N A T I O N</u>
	)	
	)	No. 09-0090
...	)	Registration No. . . .
	)	Docket No. . . .
	)	

Rule 229; RCW 82.32.060: OTHER TOBACCO PRODUCTS TAX – REFUND CLAIM – NONCLAIM STATUTE – SUBSTANTIATION REQUIREMENT. Taxpayer failed to provide the Department of Revenue with invoices supporting the amount of its refund claim. As a result, the Department of Revenue correctly denied taxpayer’s refund request due to its failure to substantiate its claim within the time limits set forth in Rule 229.

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.

Pardee, A.L.J. – Taxpayer, a retailer and wholesaler of cigars and tobacco related products, seeks a refund of Other Tobacco Products (OTP) tax, arguing that the OTP tax structure prior to July 1, 2005, suffers from several constitutional defects. We find that taxpayer failed to provide the Department with sufficient substantiation under RCW 82.32.060 and WAC 458-20-229 regarding its refund request, and therefore the Department is unable to consider taxpayer’s arguments. Accordingly, we deny taxpayer’s petition.

ISSUE

Did taxpayer fail to submit sufficient substantiation with its petition for refund, as required by RCW 82.32.060 and WAC 458-20-229, justifying denial of the petition?

FINDINGS OF FACT

[Taxpayer], a Washington limited liability company, . . . sells . . . imported cigars and tobacco related products at wholesale and retail, which it does not manufacture. With respect to sales of

<sup>1</sup> Identifying details regarding the taxpayer and the assessment have been redacted pursuant to RCW 82.32.410. Nonprecedential portions of this determination have been deleted.

such products in Washington, Taxpayer maintains a retailer's license and wholesale distributor's license.

On December 31, 2007, Taxpayer filed a Petition for Refund (Petition) in the amount of \$. . . with the Department of Revenue's (Department's) Appeals Division (Appeals), for Other Tobacco Products (OTP) tax reported for the period 2003 through Second Quarter 2005 (Refund Period), including December 2002 liability filed in January 2003. Taxpayer claims that it relied upon the Department's reading of RCW 82.26.010(7), and therefore incorrectly measured and reported its OTP liability. During the hearing, Taxpayer's representative asserted that Taxpayer should not have paid any OTP during the Refund Period, and that Taxpayer requests a full refund of all OTP paid during the Refund Period. On January 30, 2008, Appeals forwarded Taxpayer's Petition to the Department's Taxpayer Account Administration Division (TAA) to treat as a refund application. Per correspondence dated February 27, 2008, TAA sought additional information from Taxpayer to substantiate its refund application, including invoice copies and a copy of all manufacturers' wholesale sales price lists. TAA set the deadline for submission of such information at May 29, 2008 (i.e., 90 days from Taxpayer's submission of its Petition). Taxpayer's representative verbally responded, informing TAA that the request was too onerous in terms of the number of invoices, and that a manufacturer's price list was unavailable.

On June 5, 2008, TAA denied Taxpayer's Petition, stating that it had not received the information it requested from Taxpayer on February 27, 2008. On July 3, 2008, Taxpayer "re-filed" its Petition with the Department's Appeals Division, effectively appealing TAA's denial of its Petition.

### ANALYSIS

RCW 82.32.170, the statute authorizing the filing of administrative refund claims, states:

Any person, having paid any tax, original assessment, additional assessment, or corrected assessment of any tax, may apply to the department *within the time limitation for refund provided in this chapter*, by petition in writing for a correction of the amount paid, . . . *in which petition he shall set forth the reasons why the conference should be granted, and the amount in which the tax, interest, or penalty should be refunded.*

(Emphasis added). The time limitation referred to in RCW 82.32.170 is found in RCW 82.32.060, Washington's tax refund statute, which states:

(1) . . . Except as provided in subsection (2) of this section, no refund or credit shall be made for taxes, penalties, or interest 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). Washington's refund statute is a nonclaim statute. *Guy F. Atkinson Co. v. State*, 66 Wn.2d 570, 572 (1965) ("Although both plaintiffs and the commission in their respective briefs treat the problem posed by RCW 82.32.060 as one dealing with a statute of

limitations, strictly speaking the question is one of nonclaim, rather than one of statute of limitations.”); *Paccar, Inc. v. Dep’t of Revenue*, 85 Wn. App. 48, 51 n.3 (1997), *rev’d on other grounds*, 135 Wash.2d 310 (1998) (“[I]t is a nonclaim statute in that does more than extinguish the ability to seek a remedy; it creates and destroys the underlying right to a refund or credit.”)

As a nonclaim statute, RCW 82.32.060 “designates the time allowed for the taking of a step which is a prerequisite to the bringing of an action.” *Guy F. Atkinson Co.*, 66 Wn.2d at 572. RCW 82.32.060 is procedural, and the limitation it imposes is addressed to the power of the Department to make a refund and the conditions under which it may be made. *Id.* Once a time limit in a nonclaim statute passes, the right to bring an action is “extinguished and cannot be revived by a subsequent statute enlarging the time limitation.” *Lane v. Dep’t of Labor and Indus.*, 21 Wn.2d 420, 425 (1944). *See also* Black’s Law Dictionary 1078 (8<sup>th</sup> ed. 2004) (defining “nonclaim” as follows: “A person’s failure to pursue a right within the legal time limit, resulting in that person’s being barred from asserting the right.”) Courts may not apply equitable principles to excuse a failure to comply with a nonclaim statute. *See Longview Fibre Co. v. Cowlitz County*, 114 Wn.2d 691, 699 (1990) (“We will not give relief on equitable grounds in contravention of a statutory requirement.”); *Coluccio v. King County*, 82 Wn. App. 45, 47 (1996) (“[A] taxpayer is not entitled to equitable relief when the statutory method for obtaining relief has not been followed.”)

Under WAC 458-20-229(3)(b)(v) (Rule 229(3)(b)(v)), a taxpayer is encouraged to file substantiation documents at the time of the filing of the refund application. Once the application is filed, however, the taxpayer must submit sufficient substantiation to support the claim for refund before the Department can determine whether the claim is valid. *Id.* The department will notify the taxpayer if additional substantiation is required. *Id.* The requisite timelines for submission of such substantiation after such notice is sent are laid out in Rule 229(3)(b)(v), which provides both a 90 day period, and 180 day period, stating:

The taxpayer must provide the necessary substantiation within ninety days after such notice is sent, unless the documentation is under the control of a third party, not affiliated with or under the control of the taxpayer, in which case the taxpayer will have one hundred eighty days to provide the documentation.

Rule 229(3)(b)(vii) states that if the Department does not receive the necessary substantiation within the applicable time period, the Department “shall” deny the claim for lack of adequate substantiation. In its discretion, the Department may extend the period for providing substantiation, however, for good cause shown, which may not be unreasonably denied. Rule 229(3)(b)(vi). . . .

Taxpayer’s representative verbally responded to TAA’s February 27, 2008, request for additional substantiation per Rule 229 by stating that the request was *too onerous* in terms of the number of invoices and, further, whereas numerous distributors’ wholesale price lists were perhaps available, no one is able to secure or positively identify a manufacturer’s price list. Once Taxpayer filed its Petition, however, it was required under Rule 229(3)(b)(v) to submit sufficient substantiation to support its Petition. Taxpayer failed to provide TAA with sufficient substantiation to support its Petition. In addition to failing to provide invoices supporting the

amount of its refund claim, Taxpayer failed to provide evidence pertinent to deciding the manufacturer's list price, which during the Refund Period is crucial to measuring OTP tax due. An analysis of the OTP tax structure prior to July 1, 2005, bears this out.

The OTP tax is imposed upon the "sale, use, consumption, handling, or distribution of all tobacco products in this state." RCW 82.26.020(1). Distributors handling untaxed OTP in Washington must pay the tax. RCW 82.26.020(2)(d). Taxpayer, as a distributor of untaxed OTP it purchased, was liable for OTP tax.

Prior to July 1, 2005, to compute the OTP tax, Washington distributors multiplied the rate of the OTP tax times their wholesale purchase price. At that time, the "wholesale sales price" was defined under RCW 82.26.010(7) as:

[T]he established price for which a manufacturer sells a tobacco product to a distributor, exclusive of any discount or other reduction;<sup>2</sup>

Prior to July 1, 2005, the statutory measure of the OTP tax was the manufacturer's list price or invoice price; i.e., the fair market value of the products. *United States Tobacco Sales and Marketing Co. Inc. v. Dep't of Revenue*, 96 Wn. App. 932, 941-42 (1999)(*U.S. Tobacco I*). In other words, the proper measure of the tax on a manufacturer's sale of tobacco products was the fair market value of the products at the time of the manufacturer's sale (i.e., sale to a distributor). *McLane Co. Inc. v. Washington State Dep't of Revenue*, 105 Wn. App. 409, 415 (2001)(citing *U.S. Tobacco I*, 96 Wn. App. at 941). "The pertinent inquiry is what is the fair market value, not how it is determined, for what purpose, or by whom." *U.S. Tobacco I*, 96 Wn. App. at 943. As the Court of Appeals explained in *McLane*:

Neither this court nor the Department can ignore this plain language [RCW 82.26.010(7)] even though it may be difficult to determine the amount to be taxed. Furthermore, the Department concedes that the sales price from the out-of-state suppliers to the in-state distributors does not set the measure of the tax. Rather, it is only *evidence* of the manufacturer's market price.

105 Wn. App. at 417-18 (bracketed portion added for clarification).

In *United States Tobacco Sales and Marketing Co. Inc. v. Washington State Dep't of Revenue*, 128 Wn. App. 426, 434 (2005)(*U.S. Tobacco II*) the court reasoned that invoices establishing the price paid for OTP is still evidence to be considered in establishing the manufacturer's market price per *McLane*. Accordingly, such invoices provide evidence that Taxpayer must provide in seeking a refund.

In this case Taxpayer failed to provide the invoices. Rule 229 allows TAA to request the invoices to support a taxpayer's claim. Per Rule 229(3)(b)(v), the Department . . . notified the

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<sup>2</sup> Effective July 1, 2005, RCW 82.26.010 was amended, and this definition is no longer applicable. The quoted portion was in effect during the Refund Period.

taxpayer that additional substantiation [was] required within a specified timeframe. . . . Since Taxpayer did not submit the requested substantiation (or any substantiation for that matter) within the requisite timeframe, TAA notified Taxpayer that its Petition was denied, consistent with Rule 229(3)(b)(7).<sup>3</sup>

In its Petition, Taxpayer raises various constitutional arguments to the OTP tax structure prior to July 1, 2005:

- That it is “vague or indefinite as to render the OTP tax unconstitutional.”
- That it violates the Due Process Clause.
- That the Department’s policy and application of the OTP tax is inconsistent with the OTP statutes, and therefore a violation of Taxpayer’s right to due process under the Due Process Clause.

The Department is unable to consider Taxpayer’s arguments, given its failure to comply with RCW 82.32.060 and Rule 229, and the holdings in *Guy F. Atkinson Co.* and *Lane*. We note generally, however, that an administrative agency is not empowered to pass on the constitutionality of the law it administers. *Bare v. Gorton*, 84 Wn.2d 380, 383, 526 P.2d 379 (1974). Only the courts have that power. *Id.* Furthermore, with respect to the first half of 2005, we find that the Department’s policy and application of OTP tax is consistent with RCW Ch. 82.26. The only evidence Taxpayer provided supports the valuation of the Department. Taxpayer reported OTP tax using a measure of its own choosing, then asked for a refund, which it failed to substantiate. In any event, we deny Taxpayer’s petition.

#### DECISION AND DISPOSITION

Taxpayer’s petition is denied

Dated this 8<sup>th</sup> day of April 2009.

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<sup>3</sup> Any application denied for lack of adequate substantiation may be filed again with additional substantiation at any time before the time limits in Rule 229(2) expire. Rule 229(3)(b)(vii).