

Cite as Det. No. 13-0185, 33 WTD 59 (2014)

BEFORE THE APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition for Refund:)	<u>D E T E R M I N A T I O N</u>
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)	No. 13-0185
. . .)	
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RULE 240A; RCW 82.62.050: RURAL COUNTY B&O TAX CREDIT FOR NEW EMPLOYEES – ANNUAL REPORT. Where the Department rescinds the rural county B&O tax credit for failure to file the second annual report, the Department may reinstate the credit where the taxpayer later substantiates it satisfied the requirements of the credit.

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.

Chartoff, A.L.J. – A taxpayer appeals the rescission of the rural county business and occupation tax credit for new employees authorized under chapter 82.62 RCW, and requests a refund of business and occupation tax paid as a result of the rescission. The Taxpayer Account Administration Division (TAA) of the Department of Revenue (Department) rescinded the credit because the taxpayer failed to file a second annual report required by the Department to verify the eligibility requirements of the tax credit have been met. The taxpayer argues the credit should be reinstated because it has now provided the report substantiating its eligibility for the credit, and because a second annual report is not mandated by statute. We grant the petition.¹

ISSUE

Where the rural county business and occupation tax credit for new employees, authorized under chapter 82.62 RCW, is rescinded for failure to file the second annual report, should the credit be reinstated when the taxpayer subsequently files the report?

¹ Identifying details regarding the taxpayer and the assessment have been redacted pursuant to RCW 82.32.410.

FINDINGS OF FACT

The taxpayer is a [manufacturer] located in . . . Washington.

The taxpayer filed an application for the rural county business and occupation tax credit for new employee (tax credit) on November 25, 2009. The application states on page 2 that annual reports are required:

Annual Report is required:

Annual reports will be required for two years after application. The first annual report, due within 30 days of the end of Quarter D above, will be used to check how many employees have been hired and affirm that the 15% target has been achieved. The second annual report, due one year after the first report, will be used to confirm that the employees have been retained. See the Annual Report form for additional information.

On December 8, 2009, the Taxpayer Account Administration Division (TAA) of the Department of Revenue (Department) sent a letter to the taxpayer stating it had approved the taxpayer's application for 16 full time equivalent (FTE) positions with salaries and benefits totaling \$40,000 or less, and 14 FTEs with salaries and benefits over \$40,000.

The taxpayer filed the first annual report on October 29, 2010, which was accepted.

On December 1, 2010, TAA sent the taxpayer a letter stating it had reviewed the annual report the taxpayer submitted and concluded the taxpayer was eligible for a B&O tax credit of \$78,000. The letter states, in pertinent part:

The reports show 21 new FTE positions were created with salaries and benefits under \$40,000 and 9 new FTE positions were created with salaries and benefits \$40,000 and over in 2009 and 2010. If these positions are maintained through 2011, the certificate will be perfected. ...

In order to perfect this credit, a New Employee Annual Report will need to be submitted at the end of the next calendar year.

(emphasis in the original).

On October 3, 2011, TAA sent the taxpayer a letter reminding the taxpayer to submit the annual report for the tax credit by October 31, 2011. The taxpayer did not file the second annual report.

On December 29, 2011, TAA informed the taxpayer by letter that the tax credit had been rescinded because the taxpayer failed to file the second annual report. TAA stated it presumed the employment requirements of the credit had not been met. Because the taxpayer had used \$. . . of the credit, an assessment for \$. . . was issued, which includes \$. . . of interest. The letter informed the taxpayer of its appeal rights. The taxpayer paid the assessment plus late payment of assessment penalties and additional interest on February 24, 2012.

The taxpayer states that it has no knowledge of whether it received the letter dated October 3, 2011 or the assessment dated December 29, 2011. . . .

On June 18, 2012, the taxpayer petitioned the Appeals Division of the Department of Revenue for refund of the assessment amount paid, and reinstatement of the tax credit. The taxpayer submitted with the petition the second annual report, dated June 16, 2012.

The taxpayer and TAA agree that the substantive requirements have been met. Disputed is whether the rescission of the credit for late filing of the report can be reversed. TAA argues that the second annual report is necessary to verify that the requirements of the credit have been met. When a taxpayer fails to provide the information necessary to substantiate the credit, TAA “presumes” that the employment requirements are not met. The taxpayer argues that the requirement to file a second annual report is not clearly mandated in RCW 82.62.050 or on the program fact sheet published by the Department (TSFS0066 08/08).² The taxpayer argues that since it has now proven it satisfied the requirements of the credit, the rescission should be reversed.

ANALYSIS

The rural county business and occupation tax credit for new employees (tax credit) is authorized in chapter 82.62 RCW, and “provides B&O tax credit to certain persons engaged in manufacturing and research and development activities. The credits are intended to stimulate the economy by creating employment opportunities in specific rural counties and community empowerment zones in this state.” WAC 458-20-240A(1) (Rule 240A).³

The authorizing statute imposes various procedural and documentation requirements in order to claim the credit. First, taxpayers must file an application for tax credits within 90 days of filling the first qualified employment position. RCW 82.62.020. The credit is measured by qualified employment positions created in a four consecutive calendar quarter period. The Department must rule on the application within sixty days. RCW 82.62.020. Then, approved recipients may begin claiming the credit on their excise tax return. The credit is taken against B&O tax due, and may be carried forward until used. No refunds are allowed for any tax credits which exceed the recipient’s B&O tax liability during the life of this program. RCW 82.62.030(4); Rule 240A(8)(b).

Following the end of the four consecutive calendar quarters in which the credit is earned, recipients must file a report. RCW 82.62.050(1) requires recipients of the tax credit to submit a report to the Department containing “information, as required by the department, from which the department may determine whether the recipient is meeting the requirements” of chapter 82.62 RCW. RCW 82.62.050(1) states that the report is due by the last day of the month immediately following the end of the four consecutive full calendar quarter period for which a credit under

² The undersigned was unable to find a copy of the 2008 version of the program fact sheet cited by the taxpayer. However, we note the 2010 version of the fact sheet does not specifically state that a second annual report is required.

³ WAC 458-20-240A implements the rural county business and occupation tax credit for new employees and applies to applications filed prior to July 1, 2010. WAC 458-20-240 applies to applications filed after June 30, 2010.

this chapter is earned.⁴ “If the recipient fails to submit a report or submits an inadequate report, the department may declare the amount of taxes for which a credit has been used to be immediately assessed and payable.” *Id.* “An inadequate report is one which fails to provide information necessary to confirm that the requisite number of employment positions has been created and maintained for twelve consecutive months.” WAC 458-20-240A(9)(b).

In addition to the report, a recipient of tax credits must also maintain and provide upon request records to establish eligibility for the credit. RCW 82.62.050(1) states that “[t]he recipient must keep records, such as payroll records showing the date of hire and employment security reports, to verify eligibility under this section.” Rule 204A(9) further explains, in pertinent part:

(a) **Verification of annual report.** The department will use the same report the recipient provides to the department of employment security, which is known as the quarterly employment security report, to verify the recipient's eligibility for tax credits. The recipient must maintain copies of the quarterly employment report for the year prior to the year for which credits are claimed, the year credits are claimed, and for the four quarters following the hiring of persons to fill the qualified employment positions. (The recipient does not have to forward copies of the quarterly employment report to the department each quarter.) The department may use other wage information provided to the department by the department of employment security. The taxpayer must provide additional information to the department, as the department finds necessary to calculate and verify wage eligibility.

If on the basis of the report or other information, the Department determines that the taxpayer does not qualify for the credit, the credit must be repaid, with or without interest depending on the reason the taxpayer failed to qualify. RCW 82.62.050(2), (3). RCW 82.62.050 states, in pertinent part:

(2) If, on the basis of a report under this section or other information, the department finds that a business project is not eligible for tax credit under this chapter for reasons other than failure to create the required number of qualified employment positions, the amount of taxes for which a credit has been used for the project shall be immediately due.

(3) If, on the basis of a report under this section or other information, the department finds that a business project has failed to create the specified number of qualified employment positions, the department shall assess interest, but not penalties, on the credited taxes for which a credit has been used for the project. The interest shall be assessed at the rate provided for delinquent excise taxes, shall be assessed retroactively to the date of the tax credit, and shall accrue until the taxes for which a credit has been used are repaid.

⁴ “For purposes of this chapter, a credit is earned for the four consecutive full calendar quarters after the calendar quarter during which the first qualified employment position is filled.” RCW 82.62.030(1)(b)(ii).

In the present case, the taxpayer applied for the tax credit, and the Department notified the taxpayer that the application was approved. The taxpayer filed the annual report, which was accepted. TAA advised the taxpayer that a second annual report was necessary to verify the taxpayer satisfied the conditions of the credit. The taxpayer failed to submit this report by TAA's deadline. As a result, TAA presumed that the taxpayer failed to maintain the specified number of qualified employment positions, and assessed tax for which a credit has been used, plus interest, under RCW 82.62.050(3).

The general administrative provisions of Chapter 82.32 RCW apply to the administration of chapter 82.62 RCW. RCW 82.62.070. Persons claiming the tax credit must "keep and preserve . . . suitable records as may be necessary to determine the amount of any tax for which he may be liable." RCW 82.32.070. Such books and records must be open for examination at any time by the department. *Id.* Where a taxpayer fails or refuses to make any return or to make available for examination the records required by this chapter, the Department may estimate the tax due and issue an assessment for such tax, interest and penalty. RCW 82.32.100(1), (2). However, such action does not preclude the person from appealing the assessment. RCW 82.32.100(1).

In the present case, because the taxpayer failed to provide records upon TAA's request to prove entitlement to the credit, we conclude that TAA was justified in issuing an estimated assessment under RCW 82.32.100. However, the taxpayer is not precluded from appealing the assessment under chapter 82.32 RCW. *Id.* In addition, we note that chapter 82.62 RCW does not explicitly bar reinstatement of the credit under the present circumstances. Here, the taxpayer paid the assessment, and then petitioned for refund within the statutory time limitations, and provided the missing report. *See* RCW 82.32.060 and 82.32.180 (imposing time limitations for refunds and court appeals). On the basis of this report, TAA determined that the taxpayer created and maintained the specified number of qualified employment positions required to claim the tax credit. Because the taxpayer has now provided records substantiating it satisfied the requirements of the credit, we conclude the taxpayer is entitled to claim the credit, and we grant the petition for refund. We remand the petition to TAA for calculation of the credit and processing of the refund request.

DECISION AND DISPOSITION

The petition is granted. We remand the petition to TAA for calculation of the credit and processing of the refund request.

Dated this 18th day of June 2013.