Cite as Det. No. 13-0358, 33 WTD 171 (2014)

BEFORE THE APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition for Refund and Correction of Assessment of	)	D E T E R M I N A T I O N
	)	No. 13-0358
. . .	)	Registration No. . . .
. . .	)	Registration No. . . .

[1] RULE 268, RCW 82.04.4452: HIGH TECH R&D CREDIT – SURVEY – TIMELY FILED -- SURREAL. Corporations were not entitled to claim the high technology R&D tax credit when they failed to file surveys for the year in which the credits were claimed.

[2] RULE 24003; RCW 82.04.4452, RCW 82.63.010: HIGH TECH R&D CREDIT – QUALIFIED RESEARCH –AFFILIATE – CIMLINC. Two affiliated corporations could not claim the high technology R&D credit for the same research performed by one of the affiliates.

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.

M. Pree, A.L.J. – Two affiliated corporations, conducting research in Washington, protest the denial of a portion of high tech credits they claimed. Because the corporations failed to file surveys for the year in which the credits were claimed, and both corporations claimed the credit for the same research, we deny their petitions.[1]

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

ISSUES

1. Under RCW 82.04.4452 and WAC 458-20-268 (Rule 268), were taxpayers entitled to claim the high technology research and development (R&D) tax credit when they failed to file surveys.

2. Under RCW 82.04.4452 and WAC 458-20-24003 (Rule 24003), were two affiliated corporations entitled to claim the high technology R&D tax credit for the same research that one corporation performed for the other?

FINDINGS OF FACT

[Taxpayer A] and [Taxpayer B], referred to collectively as taxpayers, are affiliated companies doing business at a shared office in Washington. [Taxpayer A] provides data processing and other management information services . . . for government agencies and private businesses. While [Taxpayer A] contracted with these agencies and business for all the services, which it billed in its name and entered on its books, [Taxpayer B] subcontracted with [Taxpayer A] to provide computer, data processing, and other management information services, which enabled [Taxpayer A] to meet its obligations.

On August 10, 2006, [Taxpayer A] requested a refund of $. . . for the period of January 1, 2003 through December 31, 2005 for unclaimed high tech credits. [Taxpayer A] did not file a tax incentive survey for 2004. It did file a survey for 2005 on March 30, 2006. Also on August 10, 2006, the Department received a refund request of $. . . from [Taxpayer B] dated March 31, 2006. [Taxpayer B] did not file a survey for 2004, but did file one for 2005 on March 30, 2006.

The Department's Audit Division then conducted compliance audits with the objective of verifying that the taxpayers' Washington State business activities and transactions were properly reported on their excise tax returns.[2] The audits covered the period from January 1, 2003 through December 31, 2005, the same period as the refund claim. For [Taxpayer B], the Audit Division allowed a $122,016 high tech credit for 2003, a $97,089.19 high tech credit for 2004, and no credit for 2005. For [Taxpayer A], the Audit Division allowed a $36,446 high tech credit for 2003 and a high tech credit of $12,336 for 2004. The Audit Division did not allow [Taxpayer A] the high tech credit for 2005. The Audit Division also issued assessments referenced above against the taxpayers. The taxpayers appealed.

The taxpayers' petitions requested additional refunds than those accepted by the Audit Division. The petitions did not dispute the adjustments to the taxpayer's income or deductions in the assessments. The taxpayers disputed two issues, which pertained to the B&O tax high tech credits allowed by the Audit Division. First, the Audit Division did not allow the high tech

[2] The audits were qualified to the extent that the Department reserved the right to verify any other liability within the statute of limitations period.

credit for 2005[3] because the taxpayers did not file their 2004 surveys in 2005. Second, in computing the credit, [Taxpayer A] used the amount paid to [Taxpayer B] for R&D. [Taxpayer B] claimed the credit for the same R&D. The Audit Division reduced the credit available to [Taxpayer A] by the credit taken by [Taxpayer B].

ANALYSIS

Our disputes pertain to RCW 82.04.4452, which provides a high technology credit against B&O tax for "qualified research and development." During the relevant period, RCW 82.04.4452[4] required that taxpayers claiming the credit file an annual survey. *See also* Rule 24003(20). For 2004,[5] RCW 82.04.4452(6)(b) stated, in pertinent part, that "[t]he survey is due by March 31st following any year in which a credit is claimed." The taxpayers assert that their surveys were timely filed. They rely on *Surreal Software, Inc. v. Dept. of Revenue*, BTA Docket No. 70322 (2010). *Surreal* involved the same high technology tax credit under RCW 82.04.4452.

In *Surreal*, after filing amended returns for December 2003 through June 2008 in 2008, Surreal filed annual surveys in August 2008 for tax years 2004 and 2006. The Department disallowed the credits because the surveys had not been filed by March 31 of the year following the year for which the credits were claimed. The Board relied on the language of the statute, did not explore legislative intent, and found that "[i]f Surreal filed its amended tax returns in a timely manner . . . and filed an annual survey by March 31 of the following year . . . then RCW 82.04.4452(6)(b), which requires filing the special survey on a specific date following the year *in which* the credit is claimed – not *for which* the credit is claimed – entitles them to the R&D tax credit." *Id*. at p. 12.

The Board's reading of RCW 82.04.4452(6)(b) would have allowed taxpayers to file the survey the year following whenever they claimed the credit, and would have rendered the survey due date requirement meaningless. We must construe statutes to give effect to all of the language and to render no portion meaningless or superfluous. *Lakemont Ridge Homeowners Ass'n v. Lakemont Ridge Ltd. P'ship*, 156 Wn. 2d 696, 699, (2006). The legislature does not engage in unnecessary or meaningless acts. *John H. Sellen Construction Co. v. Dep't of Revenue*, 87 Wn.2d 878, 883 558 P.2d 1342 (1976). Therefore, we disagree with the Board's interpretation regarding when the survey was due.

The Department will not apply the *Surreal* decision to other taxpayers claiming the high tech R&D credit. The Department will continue to follow Det. No. 08-0134, 27 WTD 232. Determination No. 08-0134 explains that if a taxpayer fails to timely file an annual survey, that taxpayer is precluded from claiming the credit for the year in which the taxpayer failed to timely

[3] While the taxpayers did file their 2005 surveys in 2006, prior to the March 31, 2006 due date for 2005 surveys, the taxpayers did not file surveys in 2005 for 2004. The Audit Division allowed the larger 2004 credits based on the auditor's understanding of the law at that time that the taxpayer could claim the credit every other year. *See* Special Notice, "High Technology Business and Occupation Tax Credit Changes" dated June 21, 2005.

[4] *See* Laws of 2004, ch. 2 § 2. The new version required the survey in subsection (7)(b).

[5] The prior version did not require the survey in order to claim the credit. Therefore, this was not an issue for 2003. *See* Laws of 2000 ch. 103 § 7, which did not have a survey requirement.

file the survey. 27 WTD at 238. We conclude that the Audit Division properly denied the credit for 2005 because the taxpayers did not file surveys in 2005.

We will next address whether [Taxpayer A] could claim the credit for the same research and development as [Taxpayer B]. From July 1, 1998 to June 30, 2004, the amount of the credit was equal to the greater of:

> The person's qualified research and development expenditures;
> or
> Eighty percent of amounts received by a person other than a public educational or research institution as compensation for conducting qualified research and development
> multiplied by 0.00484 in the case of a nonprofit corporation or association; and
> multiplied by 0.015 in the case of all other persons.

Rule 24003(19)(b).[6] The taxpayers' credits were computed under the "receipts" option.

We previously denied [Taxpayer A] relief on this issue in Det. No. 07-0066 issued on March 16, 2007. Det. No. 07-066 involved 1999 through 2002 taxable periods. This determination involves the periods of 2003 through 2005. While RCW 82.04.4452 has changed, we still use the greater of the taxpayer's R&D expenditures or a percentage of the taxpayer's receipts under RCW 82.04.4452(2)(a). Both versions of RCW 82.04.4452(2) allowed taxpayers a credit measured by "the greater of the amount of qualified research and development expenditures of a person or eighty percent of amounts received by a person . . . in compensation for the conduct of qualified research and development . . . ." Then, as with our current appeal, [Taxpayer A] did not deduct the amounts that it paid to [Taxpayer B] in computing its qualified R&D receipts for purposes of calculating the high technology B&O credit. [Taxpayer B] also claimed the R&D credit for its receipts on the same R&D. [Taxpayer A] and [Taxpayer B] used the same receipts to compute their credit, getting a double benefit or credit for the same R&D.

The taxpayers used the "amounts received" method to compute the greater credit. As in Det. No. 07-0066, the taxpayers contend that under the amounts received method the statute does not require that a taxpayer deduct amounts paid to a subcontractor. In other words, they argue that their "expenditures" are wholly irrelevant in computing the amount of the credit under the amounts received method. Then, as now, we disagree.

In Det. No. 07-0066, we explained:

> The primary flaw with [[Taxpayer A]'s] analysis is that it does not give meaning to the entire sentence used in describing the amounts received method. The phrase "eighty percent of amounts received" is modified by the phrase "in compensation for the conduct of qualified research and development." Thus, the credit calculation is not based on eighty percent of total amounts received. Rather, the calculation is based on eighty percent of the amounts received as compensation for the conduct of qualified research

[6] To calculate the credit after June 30, 2004, see Rule 24003(19)(a).

> and development. Qualified research and development means "research and development performed within this state in the fields of advanced computing, advanced materials, biotechnology, electronic device technology, and environmental technology." RCW 82.63.010(14) (emphasis added). The word "performed" connotes that the activity is being done by the performer, not by agents of the performer. In the present case, [[Taxpayer A]] is not performing the qualified research and development conducted on its behalf by [Taxpayer B]. [Taxpayer B] is performing that activity, and has received the high technology R&D credit based on eighty percent of the amounts it received for performing that activity. [[Taxpayer A]] has, in effect, hired [Taxpayer B] to perform much of the research and development duties required under [[Taxpayer A]'S] subcontract.

Our analysis remains unchanged from 2007:[7]

> RCW 82.04.4452(1) provides that a B&O tax credit "is allowed for each person whose research and development spending during the year in which the credit is claimed exceeds 0.92 percent of the person's taxable amount during the same calendar year." Notably, the statute allows each person who spends sufficient money on research and development to claim the credit. Under RCW 82.04.4452(9)(c),[8] research and development spending means "qualified research and development expenditures plus eighty percent of amounts paid to a person to conduct qualified research and development." Qualified research and development expenditures means "operating expenses, including wages, . . . benefits, supplies, and computer expenses, directly incurred in qualified research and development by a person claiming the credit . . . . Thus, in determining whether a taxpayer qualifies for the credit, that taxpayer may consider not only its "qualified research expenditures" (i.e., operating expenses, wages, supplies, etc. directly incurred in qualifying R&D), but also amounts paid to others to conduct qualified research and development. The statutory language makes a clear distinction between expenditures directly incurred in qualifying research and development and spending which may include amounts paid to others.
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> As we stated above, RCW 82.04.4452(2) allows a person to calculate the credit using one of two methods. The expenditure method is based on the full amount of qualified research and development expenditures. Per RCW 82.04.4452(9)(a), these expenditures do not include amounts paid to subcontractors. The amounts received method is computed based on eighty percent of amounts received by a person in compensation for the conduct of qualified research and development. In order for the statute to be construed harmoniously, the compensation at issue must be for the conduct of qualifying research and development performed directly by the person claiming the credit; not

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[7] [We note that the definition of "qualified research and development expenditures" is currently found in RCW 82.04.4452(7)(b). The definition of "qualified research and development," though referenced in RCW 82.04.4452(7)(c), is currently found in RCW 82.63.010(16).]

[8] During our audit period, RCW 82.04.4452(9)(d) defined "Research and development spending" to mean, "qualified research and development expenditures plus eighty percent of amounts paid to a person other than a public educational or research institution to conduct qualified research and development."

> compensation relating to qualifying research and development activities performed by subcontractors. "[S]tatutes which stand in pari materia are to be read together as constituting a unified whole, to the end that a harmonious, total statutory scheme evolves which maintains the integrity of the respective statutes." *State v. Wright*, 84 Wn.2d 645, 650, 529 P.2d 453, 457 (1974). Our reading of the amounts received method achieves this goal.
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> . . . Construing RCW 82.04.4452(2) strictly but fairly, and in harmony with the other provisions of that tax credit statute, we conclude that the provision does not authorize a taxpayer that subcontracts R&D to a subcontractor to include in the "amounts received" credit calculation amounts attributed to the work actually performed by the subcontractor.

In 2007, as now, the taxpayers also assert that the Department is bound by the holding in *Cimlinc, Inc. v. Dep't of Revenue*, BTA Docket No. 54862 (June 13, 2000). Again, we disagree recognizing that that the Department did not acquiesce as elaborated in Det. No. 07-0066:

> The Department issued Excise Tax Advisory [3055.2009 (February 2, 2009)] explaining that it disagrees with and will not follow the *Cimlinc* decision. Nonacquiescence to the BTA's *Cimlinc* decision is appropriate on several grounds. The BTA has only the powers and authority conferred by statute. BTA decisions are not binding on the Department except with regard to the specific parties before the Board. See generally RCW 82.03, et seq. Moreover, it is generally understood that the failure to appeal an adverse decision (or, as in this case, the inability to appeal an adverse decision) does not bar the government from relitigating the same issue in a subsequent case involving a different person. *C.f., United States v. Mendoza*, 464 U.S. 154, 104 S.Ct. 568 (1984) (the doctrine of nonmutual offensive collateral estoppel does not extend to the United States).
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> The Department is not bound by informal BTA decisions and ETA 2009 sets out the Department's official position that it will not acquiesce to the *Cimlinc* decision. Therefore, we conclude that, absent assignment by the subcontractor, RCW 82.04.4452 does not authorize a taxpayer that subcontracts R&D to a subcontractor to include in the credit calculation amounts attributed to the work actually performed by the subcontractor.

Det. No. 07-0066 at 8-9.

In Rule 24003, the Department allows taxpayers to assign credits for qualified R&D performed under contract for another taxpayer. Rule 24003(21). [Taxpayer B] did not assign its credit to [Taxpayer A]. Therefore, [Taxpayer A] could not claim the credit for the work performed by [Taxpayer B]. We conclude that the Audit Division properly adjusted the taxpayers' credits for the amounts [Taxpayer A] paid to [Taxpayer B] for the same qualified research and development expenditures and receipts.

DECISION AND DISPOSITION

We deny the taxpayers' petitions.

Dated this 21st day of November 2013.