Cite as 4 WTD 75 (1987)

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

In the Matter of the Petition ) D E T E R M I N A T I O N
For Correction of Assessment of)
) No. 87-297
)
. . . ) Registration No. . . .
) Tax Assessment No. . . .
)
)

[1] **RULE 114, RCW 82.04.170, RCW 82.04.4282 AND RCW 28B.05.030(10):** B & O TAX --DEDUCTION -- TUITION FEES -- BIBLE COLLEGE. Educational institutions, as statutorily defined, may deduct tuition fees from the measure of their B & O tax. For those qualifying via accreditation, it is not required that such status be conferred by the state. The curriculum of this Bible college is found to be of a sufficiently general academic nature to qualify for deduction of tuition fees. Effect of 1985 amendment of RCW 82.04.170 discussed.

[2] **RULE 119, RULE 166, AND RULE 167:** B & O TAX -- RETAIL SALES TAX -- BIBLE COLLEGE -- RENTAL OF FACILITIES -- CONFERENCES -- LODGING -- MEALS. Income from the rental of conference rooms, lodging, and athletic facilities by Bible college is Service B & O taxable. Cafeteria food sales are subject to Retailing B&O and sales tax when made to non-students.

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: . . .

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. . .

DATE OF HEARING: May 14, 1986

NATURE OF ACTION:

Petition to deduct tuition fees from measure of B & O tax and reclassify lodging/conference income from Retailing to Service B & O.

FACTS AND ISSUES:

Dressel, A.L.J. -- . . . (taxpayer) is a Bible college. An examination of its books and records by the Department of Revenue (Department) for the period January 1, 1981 through June 30, 1985 resulted in Tax Assessment No. . . . for $ . . . in excise taxes and interest. This determination will address the taxpayer's appeal of certain portions of the referenced assessment.

The first two pages of the taxpayer's brief provide a good recitation of the salient facts in this matter. We will take the liberty of quoting parts therefrom:

> . . . is a degree granting institution accredited by both the Commission on Colleges of the Northwest Association of Schools and Colleges and the American Association of Bible Colleges. Both accrediting agencies hold membership in the Council on Post-Secondary Accreditation and are recognized by the United States Secretary of Education.
>
> . . . 's educational curriculum focuses on a Biblical studies program but provides a wide range of courses from which its students may choose. Included in its educational programs are classes grounded in anthropology, communication, language arts, music, drama, education, physical fitness, and the Greek language. At the end of two years study at . . . , a student may be awarded one of a number of degrees. An associate degree in Biblical studies is awarded to those students having completed the prescribed course of study at . . . in Biblical studies along with the completion of a minimum of one quarter of college or university work at another institution. . . . also awards bachelor of arts and bachelor of science degrees to those students

> completing three years of prescribed study at . . . and one year of study at another college or university. Bachelor's degrees are awarded in various fields, including gerontology. The fact that . . . is accredited by the Northwest Association of Schools and Colleges insures that . . . 's students may not only transfer credits from other degree granting institutions to . . . , but may also transfer credits earned at . . . and seek a degree from other colleges and state universities. Upon earning a bachelor's degree from . . . , a student may also be qualified to pursue a post-graduate program of study at a number of universities around the nation. Forty-seven . . . alumni are presently pursuing post-graduate degrees at such institutions as the Luther-Northwestern Seminary, St. Paul, Minnesota; Concordia Theological Seminary, St. Louis, Missouri; and Yale University Divinity School, New Haven, Connecticut on the basis of their undergraduate bachelor's degrees from . . . .
>
> As part of its general educational program, . . . also presents conferences for various segments of the community whose goals are consistent with those of . . . . These conferences are sponsored by . . . , sponsored jointly by . . . with other non-profit organizations, or sponsored by non-profit organizations and facilitated by . . . . The conferences are educational in nature and are sponsored by such groups as churches, public high schools, the U.S. Forest Service, the Washington State Department of Transportation, and professional organizations of nurses. These conferences strengthen . . . 's relationships with area church groups, assist in the student admissions process, and further . . . 's educational mission.

In addition the taxpayer's campus facilities are used each summer by the . . . Basketball School. Instruction is provided to youngsters by [the basketball school's] staff. Taxpayer employees render support services by providing meals and lodging for the basketball trainees and faculty. Those attending the basketball camp are housed in the taxpayer's dormitories and are fed in the taxpayer's cafeteria. The students pay a single fee to the [basketball] School which includes instruction, meals and lodging. The [basketball] School pays to taxpayer a flat fee for the facilities plus a

certain amount per ball player for room and board. The bill the taxpayer sends to [the basketball school] is itemized accordingly.

Another source of lodging income at issue is that realized by charging guests of taxpayer students for overnight stays in the school's dormitory facilities.

There are basically two issues to be resolved here: (1) whether tuition fees are deductible from the measure of the taxpayer's business and occupation (B & O) tax, and (2) whether income realized from renting conference, athletic, and lodging facilities is properly B & O classified as Retailing subject to retail sales tax or as Service B & O which is not subject to sales tax.

DISCUSSION:

Bona fide educational institutions may deduct tuition fees from the measure of their business and occupation taxes. Two statutes within the Revenue Act make this possible. They are RCW 82.04.4282 and RCW 82.04.170. The former states in part, "In computing tax there may be deducted from the measure of tax amounts derived from bona fide initiation fees, dues, contributions, donations, tuition fees, charges made for operation of privately operated kindergartens, and endowment funds. (Emphasis added.) "Tuition fees" and those "educational institutions" entitled to deduct them are defined in the latter authority. That law as it read during the audit period stated:

> **82.04.170 "Tuition fee".** "Tuition fee" includes library, laboratory, health service and other special fees, and amounts charged for room and board by an educational institution when the property or service for which such charges are made is furnished exclusively to the students or faculty of such institution. "Educational institution," as used in this section, means only those institutions created or generally accredited as such by the state and offering to students an educational program of a general academic nature or those institutions which are not operated for profit and which are privately endowed under a deed of trust to offer instruction in trade, industry, and agriculture, but not including specialty schools, business colleges, other trade schools, or similar institutions.

[1] An analysis of the statutory definition of "educational institution" provides an answer to the question of whether the taxpayer qualifies as such. "'Educational institution', . . . , means only those institutions created or generally accredited as such by the state . . . . " There is no evidence that the taxpayer was created by the state. As to accreditation the taxpayer has provided evidence that the school was accredited by the Commission on Colleges of the Northwest Association of Schools and Colleges in 1982 and by the American Association of Bible Colleges in 1978. Those are the only organizations by which the taxpayer has been accredited. Neither acts under the authority of the state of Washington. It would appear, therefore, that this school does not meet the requirement of general accreditation by the state.

Ordinarily, we would confine our discussion to the audit period specifically at issue. Here, however, an exception to that general policy is in order. Effective July 28, 1985, RCW 82.04.170 was amended and the definition of "educational institution" expanded. That definition, with the added section marked by brackets, now reads:

> **RCW 82.04.170** . . . "Educational institution," as used in this section, means only those institutions created or generally accredited as such by the state, [or defined as a degree granting institution under RCW 28B.05.030(10) and accredited by an accrediting association recognized by the United States secretary of education], and offering to students an educational program of a general academic nature or those institutions which are not operated for profit and which are privately endowed under a deed of trust to offer instruction in trade, industry, and agriculture, but not including specialty schools, business colleges, other trade schools, or similar institutions. (Brackets supplied.)

The effect of the additional statutory language is that an alternative to state creation or accreditation came into being. RCW 28B.05.030(10) stated: "(10) 'Degree granting institution' shall mean an educational institution, which offers educational credentials, instruction, or services prerequisite to or indicative of an academic or professional degree or certificate beyond the secondary level." The taxpayer offers such post-secondary instruction and degrees and, so, qualifies as a degree granting institution. It,

therefore, satisfies the first requirement of the alternative added to RCW 82.04.170.

The second requirement of that alternative is accreditation "by an accrediting association recognized by the United States secretary of education." The taxpayer has said that both authorities which have accredited it have been so recognized. No documentary verification of that has been provided, but, for purposes of further discussion here, we are going to assume that that is true. The qualifications for the alternative provided by the amended statute, then, are met.

That, however, does not by itself make the taxpayer's tuition fees deductible. There is more to the definition of "educational institution" contained in RCW 82.04.170, namely:

> . . . and offering to students an educational program of a general academic nature or those institutions which are not operated for profit and which are privately endowed under a deed of trust to offer instruction in trade, industry, and agriculture, but not including specialty schools, business colleges, other trade schools, or similar institutions. (Emphasis added.)

The taxpayer does not "offer instruction in trade, industry, and agriculture," so we must focus on the requirement that the institution offer an educational program of a general academic nature. Although its course titles all appear to contain some Biblical or religious reference, we believe that its educational program is of a general academic nature. The subjects taught include the areas of anthropology, communications, language arts, music, drama, education, physical fitness, the Greek language, etc. This is subject matter typical of a liberal arts program of a conventional, non-Biblical college or university which provides educational programs of a general academic nature. Certainly, such courses as Biblical Archaeology, History of Israel, Revelation - Scripture - Apologetics, Contemporary Theology, and Applied Anthropology for Missionaries are more academically than vocationally oriented.

As additional evidence of the general academic nature of the curriculum, the taxpayer provided this statement from James F. Bemis, Executive Director of the Northwest Association of Schools and Colleges:

> [Taxpayer] was initially accredited at the associate and baccalaureate degree levels in 1982 on the basis of a comprehensive self-study and a full-scale review by a five-member evaluation team that spent three days on campus.
>
> Although "Bible" is included in the name of the college, it is not an institution whose sole purpose is highly specialized instruction in the Bible. Clearly, the associate and baccalaureate degree programs offered require a substantial and coherent program of general education. The general education program provided by the college introduces students to the content and methodology of the major areas of knowledge--the humanities, the fine arts, the natural sciences, and the social sciences--and helps them to develop the mental skills that will make them more effective learners.

We also do not believe that the taxpayer is properly classified as a "specialty" school. Such schools are disqualified as institutions eligible to deduct tuition fees in the final phrase of RCW 82.04.170. While it can be argued that that phrase pertains only to those schools offering instruction in trade, industry, and agriculture, an interpretation that it applies to other schools as well is reasonable in light of the punctuation of the lengthy sentence in which the phrase appears. The Board of Tax Appeals spoke on the subject of specialty schools in Deaconess Hospital v. Dept. of Revenue, BTA Docket No. 79-26. There the Board characterized a school of nursing as a professional school which offered "to its students a program of a general academic nature appropriate to the profession of a nurse." Regarding the hospital's chaplain residency program the Board described its curriculum as being "of an advanced academic nature" and noted the fact that credits earned in the program were transferrable to various theological schools. So, too, are many of the credits earned at the taxpayer institution. Retreating momentarily to the Deaconess nursing school case, we think a legitimate analogy may be drawn to the taxpayer school in that it could be said of it that it offered "to its students a program of a general academic nature appropriate to the profession of a minister, chaplain, or a teacher of religion."

In addition, as was pointed out by the taxpayer, it is probable that the specialty school exclusion of RCW 82.04.170 was aimed at schools that teach skills rather than academics

per se. The exclusion, which is repeated in WAC 458-20-114 (Rule 114), encompasses business colleges, other trade schools or similar institutions as well as specialty schools. Rule 114 adds dancing and music schools to the list. As a group the emphasis of these schools would seem to be on the cultivation of a trade or skill, be it vocational, artistic or recreational, rather than the pursuit of knowledge through an inquiry into the teachings and questions posed by scholars. The latter phrase describes the learning approach of a conventional college or university and, we think, more closely parallels the taxpayer's approach. It is concluded, therefore, that the taxpayer provides a program of a sufficiently general academic nature and qualifies as an "educational institution."

Because it is an educational institution under the present definition found in RCW 82.04.170, it may deduct tuition fees from the measure of its B & O tax after the effective date of the amendment to RCW 82.04.170 which is July 28, 1985. This will be allowed even after July 1, 1986 on which date RCW 28B.05.030(10), to which reference is made in RCW 82.04.170, was repealed. The effect of that is that no institution can be defined as "degree granting" under RCW 28B.05.030(10) because RCW 28B.05.030(10) no longer exists. We doubt that the legislature intended to close off entirely the alternative means for qualifying as an educational institution that it established the previous year. If that was its intent, presumably, it would have deleted the phrase it added to RCW 82.04.170 in 1985. Therefore, institutions such as the taxpayer may continue to deduct tuition fees based on the referenced statutory alternative. Because RCW 28B.05.030(10) has been eliminated, all those institutions need do now to qualify under the alternative is demonstrate accreditation by a recognized association. It is not likely that deletion of the RCW 28B.05.030(10) requirement will markedly alter the list of schools eligible to deduct tuition fees as educational institutions because it is presumed that the accrediting associations will not grant accreditation status to schools which are not degree granting institutions.

Not only may the taxpayer deduct tuition fees for the period after July 27, 1985, but also it may deduct them for periods prior to that date as well. This is because the change in RCW 82.04.170 at that time was the result of a "legislative clarification." Legislative clarifications, as opposed to amendments, are generally retroactive and effective from the original date of the statute. Johnson v. Morris, 87 Wn.2d 922, 925 (1976). That case was quoted with approval in Marine

Power v. Human Rights Commission, 39 Wa. App. 609 (1985), wherein the Appellate Court at p. 615 emphasized the importance of distinguishing a statutory clarification from an amendment. The court stated:

. . .

> Under Washington law, a new legislative enactment is presumed to be an amendment rather than a clarification of existing law. Johnson, at 926. One well recognized indication of legislative intent to either clarify or amend is the existence or nonexistence of ambiguities in the original act. Bowen v. Statewide City Employees Retirement Sys., 72 Wn.2d 397, 403, 433 P.2d 150 (1967). In general, legislative amendments change unambiguous statutes and legislative clarifications interpret ambiguous statutes. Overton v. Economic Assistance Auth., 96 Wn.2d 552, 557, 637 P.2d 132, 134, 587 P.2d 535 (1978); see Bowen v. Statewide City Employees Retirement Sys., supra at 403.

. . .

The statute under consideration here, RCW 82.04.170, before it was changed in 1985, read in part:

> "Educational institution" [eligible to deduct tuitions fees], as used in this section, means only those institutions created or generally accredited as such by the state and offering to students an educational program of a general academic nature or those institutions which are not operated for profit and which are privately endowed under a deed of trust to offer instruction in trade, industry, and agriculture, but not including specialty schools, business colleges, other trade schools, or similar institutions. (Emphasis and brackets added.)

In order to qualify to deduct tuition fees, a school had to be either "created" or "generally accredited" by the state. No arm of the state, however, actually performs the function of accrediting post-high school learning institutions. Thus, if one read the statute literally, only those institutions that were actually created by the state qualified as educational institutions eligible to deduct tuition fees prior to the alteration of the statute in 1985.

The Department of Revenue, however, apparently chose not to read the statute literally and assumed that the requirement, "generally accredited by the state," could be liberally applied. In any event it has been its policy to permit private as well as public schools to deduct tuition fees from the measure of their business and occupation tax. Such private schools were obviously not created by the state of Washington but were allowed the deduction anyway as long as they were accredited by somebody and met the other statutory requirements including the offering of "an educational program of a general academic nature."

It is in this sense that RCW 82.04.170 is ambiguous. The Department of Revenue finally recognized this, and it was they who requested the referenced statutory change which became law in 1985. With the addition of the phrase, "or defined as a degree granting institution under RCW 28B.05.030(10) and accredited by an accrediting association recognized by the United States secretary of education," the policy used by the Department to determine tuition fee deductibility was codified into law and the strained interpretation previously utilized was no longer necessary. Although there is no legislative history in the House or Senate Journals for 1985, it is assumed that the reason for the statutory change is the same as that expressed for the alteration of the Department's implementing administrative rule. In the "Rule Purpose Statement" issued by the Department concomitant with its changing of WAC 458-20-114 (Rule 114) in 1985, the reasons given for altering the Rule to incorporate the language added to RCW 82.04.170 earlier that same year were:

> The business tax deduction for tuition fees has been administratively provided to accredited colleges and universities. HB 1009 expressly includes this deduction in statutory law to conform with historical administrative application. The rule is being amended to clarify this deduction.

Because the Department both authored that statement and suggested the change made by the legislature, it is reasonable to conclude that both the Rule and the statute were revised to clarify the pre-existing practice. Retreating to the passage from Marine Power v. Human Rights Commission, supra, we conclude that the change in the statute was a legislative clarification rather than a legislative amendment in the narrow sense in that it interprets an ambiguous statute,

rather than an unambiguous one.[1] Under the case authority cited, then, it is to be given retroactive rather than prospective application.[2] As a consequence, the taxpayer may deduct tuition fees realized prior to the July 28, 1985 effective date of the legislative change, as well as those collected after that date.

[2] Next to be addressed is the issue of income derived from the provision of conference and lodging facilities. The resolution of this issue hinges in large measure on the issue just discussed, tuitiion fees. The effect of our ruling on that subject is that the taxpayer qualifies as an educational institution both before and after the law was changed on July 28, 1985.

A portion of the conference/lodging income is generated by the school's cafeteria. Sales of meals, generally speaking, are retail sales; however, the sale of meals by schools is more specifically covered in WAC 458-20-119 (Rule 119) which says in part:

> SCHOOL, COLLEGE, OR UNIVERSITY DINING ROOMS. Public schools, high schools, colleges, universities or private schools operating lunch rooms, cafeterias or dining rooms for the exclusive purpose of providing students and faculty with meals are not considered to be engaged in the business of making retail sales.
>
> Where any such cafeteria, lunch or dining room caters to the public the school, college or university operating it is considered to be making retail sales and the retail sales tax must be collected from all persons to whom the meals are furnished.

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[1] It is observed that there is still ambiguity in the statute in that research reveals that nobody seems to know what "generally accredited," as opposed to just plain "accredited," means.

[2] If the statutory change was a response by the legislature to an appellate court construction of the original statute, then only prospective application would be given the revised statute notwithstanding its qualification otherwise as a legislative clarification. See Marine Power v. Human Rights Commission, supra.

Here, it is our understanding that the cafeteria facilities are used by the various groups that rent the conference and athletic facilities as well as by regular students and faculty. Groups using the facilities include the Washington State Department of Transportation, . . . County, the . . . Fire Department, . . . School District, the . . . Basketball Camp, the . . . Football Camp, a computer camp and a volleyball camp. Obviously, the cafeteria does not serve the exclusive purposes of the taxpayer's student body and faculty. It caters to at least a portion of the public, so its sales of meals to those non-students are deemed retail sales subject to Retailing B & O and retail sales tax. If the taxpayer has a reliable, documentary means of segregating sales to non-students from those to students, only the former will be classified as retail and subject to sales and business and occupation tax. For purposes of this segregation those attending conferences, whether sponsored by the taxpayer or not, will not be considered students. Only those individuals earning college credits pursuant to the school's regular educational program qualify as such. If the taxpayer does not have an accurate system for differentiating between students and others, all cafeteria sales will be deemed retail. See RCW 82.32.070.

As to non-meal income realized in connection with the school's provision of lodging and conference facilities, Rule 167 applies. It states in part:

> Educational institutions, school districts and student organizations are not subject to the business and occupation tax with respect to activities directly connected with the educational program, such as operation of a common dining room, sale of lab supplies, etc. Charges made for the operating of privately operated kindergartens are exempt from business tax.

Although an argument can be made that the subject conferences and seminars are connected with the educational program, we do not believe that the Rule was intended to apply so broadly. The better view, in our judgment, is that to be exempt of business and occupation tax, activities directly connected with the educational program must be connected to the kind of program described in the above-referenced definition of educational institution. The program on which accreditation of such an institution is based is the regular curriculum, the one found in the school's catalog. It is the one through which college credits are earned, enough of which will qualify

a student for a degree. It is not the program of seminars and conferences, which is at issue. Such meetings may relate to the "mission" of the institution, but they are outside the function for which the school obtained accreditation. As such they are deemed not directly connected with the educational program and, consequently, do not qualify for exemption from the business and occupation tax. Income from these activities has been properly classified under Service and Other Business Activities. See also WAC 458-20-224 (Rule 224).

As to the rental of dormitory rooms to guests of students, WAC 458-20-166 (Rule 166) is instructive. It reads in part:

> **Hotels, motels, boarding houses, rooming houses, resorts, summer camps, trailer camps, etc.** A hotel, motel, boarding house, rooming house, apartment hotel, resort lodge, auto or tourist camp, and bunkhouse, as used in this ruling, includes all establishments which are held out to the public as an inn, hotel, public lodging house, or place where sleeping accommodations may be obtained, whether with or without meals or facilities for preparing the same. . . . Further, the foregoing does not include private lodging houses, dormitories, bunkhouses, etc., operated by or on behalf of business and industrial firms solely for the accommodation of employees of such firms, and which are not held out to the public as a place where sleeping accommodations may be obtained. The terms do not include guest ranches or summer camps which, in addition to supplying meals and lodging, offer special recreation facilities and instruction in sports, boating, riding, outdoor living, etc.
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> . . .
>
> The tax liability of hotels, motels, boarding houses, rooming houses, resorts, summer camps, trailer camps, etc., is as follows:
>
> BUSINESS AND OCCUPATION TAX
>
> RETAILING. Amounts derived from the charge made to transients for the furnishing of lodging; charges for such services as the rental of radio and television sets and the rental of rooms, space and facilities not for lodging, such as ballrooms, display rooms, meeting rooms, etc., and including

> automobile parking or storage; also amounts derived from the sale of tangible personal property at retail are taxable under this classification. See "retail sales tax" below for a more detailed explanation of the charges included herein as retailing.
>
> SERVICE AND OTHER BUSINESS ACTIVITIES. Taxable under this classification are amounts derived from the rental of sleeping accommodations by private lodging houses, and by dormitories, bunkhouses, etc., operated by or on behalf of business and industrial firms and which are not held out to the public as a place where sleeping accommodations may be obtained; . . .

The taxpayer rents its dormitory rooms so it is not properly put in the hotels, motels, boarding house, etc., category which is generally taxable under Retailing. Although the taxpayer does advertise to a limited extent that overnight accommodations may be had in conjunction with rental of the conference facilities, it does not hold itself out as a place where sleeping accommodations may be obtained in the same sense that a hotel, motel, or boarding house would. Such accommodations are available on a restricted basis. Only guests of students or those using conference facilities are eligible. A further limitation on their availability is the fact that the conference facilities are only rented to non-profit, governmental or religious groups.

Income from the rental of dormitory rooms under Rule 166 is B & O classified as Service. Although the Service paragraph quoted above does not mention meeting rooms and similar facilities, we think those as well as the athletic facilities should fall in the same category because the taxpayer is not a hotel, motel, boarding house, etc. Meeting rooms are mentioned in the Retailing paragraph of the rule but that paragraph only pertains to hotels, motels, boarding houses, etc. Because this taxpayer is none of those and because its sleeping room income is subject to Service tax, we think that same classification is appropriate for its rental of meeting rooms and athletic facilities. Income from the rental of those facilities by hotels is reportable under the one category. No valid basis is perceived for more than one classification in the case of a non-hotel entity like the taxpayer. Thus, income from the rental of guest rooms, conference rooms, and athletic facilities, such as those used

by the . . . camp, is subject to Service B & O tax. Retail sales tax does not apply.

In summary, this is how our ruling on the income derived from conferences and lodging affects the audit assessment as issued. Except for meals served to non-students, all such income is reclassified to Service Other and is not subject to retail sales tax. Tuition fees paid by students enrolled in the school's regular curriculum only, are deductible for business and occupation tax purposes both before and after the July 28, 1985 amendment of RCW 82.04.170. Those fees paid by conference or seminar attendees do not qualify for deduction.

DECISION AND DISPOSITION:

The taxpayer's petition is granted in part and denied in part. As a condition on the deductibility of tuition fees, the taxpayer must first provide to the Audit Section documentary evidence that the associations by which it is accredited are recognized by the United States Secretary of Education and the effective dates of that accreditation. If there are any periods within the audit period during which the taxpayer was not accredited by an association recognized by the United States Secretary of Education, tuition fees for those periods may not be deducted. Upon receipt of this information, the Audit Section will issue an amended assessment, consistent with this Determination which assessment will be due on the date stated thereon. Because the due date has been extended for the sole convenience of the Department, interest will be waived from August 1, 1986 through the new due date.

DATED this 28th day of August 1987.