

Cite as 4 WTD 113 (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. 87-304
)
)
) Registration No. .
)
) Fish Tax Assessment
No.)
)

- [1] **FISH TAX and RCW 82.27.040:** CREDIT -- TAX PAID TO ANOTHER STATE -- IMPORT DUTY PAID TO UNITED STATES. A credit is allowed against the food fish tax for tax paid to another state upon same food fish purchased in the other state. Import duty is held to be a tax. United States of America is held not to be a "state" in the statutory language. Where taxpayer paid the tax (import duty) to the U.S. Government on fish purchased from a Canadian vendor, the credit was not allowed because the U.S. is not a state and because the fish was not purchased in the state (if the U.S. were to be considered a state) to which the tax was paid.
- [2] **FISH TAX and RCW 82.27.020(1) and (3):** MEASURE OF TAX -- TAXABLE EVENT --FIRST POSSESSION -- FISHERMAN'S COST PRICE. The measure of the fish tax is the price paid by the first person in possession of the food fish or shellfish. The taxable event is the first possession by an owner after the food fish or shellfish have been landed. The fisherman, on catching the fish, is the first person in possession; but the taxable event does not occur at that time. Thus, his cost in catching the fish is not the measure of the tax. Furthermore, when he sells the fish before they have been landed, no taxable event has occurred.
- [3] **FISH TAX and RCW 82.27.020(3):** MEASURE OF TAX -- PRICE PAID -- DELIVERY CHARGE. The measure of the tax is the "price paid." The charge for delivery (cost of

transporting from the fishing grounds to the point of landing) of fish is not deductible from the measure of the tax where the fisherman delivers the fish to the point of landing.

- [4] **FISH TAX and RCW 82.27.020(3):** MEASURE OF TAX -- PRICE PAID -- DELIVERY BY TENDER TO SHORE -- DELIVERY CHARGE. The measure of the tax is the "price paid." The delivery charge by a tender, under contract to the buyer, for delivery of fish from the fishing vessel to the buyer's plant on land is not includable in the measure of tax.

- [5] **FISH TAX and RCW 82.27.020(1):** EXEMPTION -- FIRST POSSESSION -- TAXABLE EVENT -- OUT OF STATE. The taxable event is the first possession by an owner after the food fish or shellfish have been landed. The statute need not state that first possession "in Washington" is the taxable event because Washington has no jurisdiction to assert a tax on possession outside Washington. Taxpayer held not to be exempt from fish tax merely because a fisherman outside Washington or person in Canada had first possession of the fish.

- [6] **RULE 228 and RCW 82.32.050:** INTEREST -- MANDATORY -- NOT A PENALTY -- CIRCUMSTANCES BEYOND CONTROL OF TAXPAYER. Assessment of interest upon the tax deficiencies disclosed by audit is mandatory. The assessment of interest is not in the nature of a penalty. Waiver of the interest is authorized when caused by circumstances beyond the control of taxpayer. Taxpayer's initial lack of experience in and lack of understanding of the law are not circumstances beyond the control of taxpayer.

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: February 12, 1987

NATURE OF ACTION:

Petition for correction of fish tax assessment by seeking a credit for import duties paid, adjustment of the measure of the fish tax and exemption from fish tax for fish landed outside Washington. The taxpayer also petitions for waiver of the interest on the assessed taxes.

FACTS AND ISSUES:

Krebs, A.L.J. -- [The taxpayer] is a wholesale fish dealer.

An examination of the taxpayer's fish purchase records for the period from January 1, 1982 through December 31, 1984 resulted in the issuance of Fish Tax Assessment No. . . . for additional fish tax of \$. . . and interest of \$. . . for a total of \$ The taxpayer paid \$. . . in October 1986; a credit of \$. . . was applied for February, 1987 return and the balance remains due.

The assessment of additional fish tax due resulted from the auditor's finding that the taxpayer did not report and pay tax on fish purchases consisting of fish products purchased from Canadian vendors and on additional amounts paid to Washington fishermen for delivering their fish to the taxpayer's dock.

The taxpayer disputes four aspects of the tax assessment as follows:

1. The taxpayer seeks a credit in the amount of \$. . . for its payment of "duty" to the U.S. government.

The taxpayer cites the language of RCW 82.27.040 (in effect during the audit period) as stating:

A credit shall be allowed against the tax imposed by RCW 82.27.020 upon food fish or shellfish with respect to any tax legally imposed and paid to another state by the taxpayer upon the same food fish or shellfish purchased in the other state.

The taxpayer was required to pay a customs duty on the importation of fish. The taxpayer asserts that the duty paid was a tax paid and cites the definition of "duty" in Blacks Law Dictionary:

A tax or impost due to the government upon the importation or exportation of goods.

The taxpayer asserts that the meaning of the word "state" as it is used in RCW 82.27.040 should be given a broad definition to include the United States of America and that there is no indication in the statute that the word is meant to refer to one of the component states. The taxpayer cites the statute as amended in 1985 to support its assertion; the statute reads:

A credit shall be allowed against the tax imposed by RCW 82.27.020 upon enhanced food fish with respect to any tax

previously paid on that same enhanced food fish to any other legally established taxing authority. To qualify for a credit, the owner of the enhanced food fish must have documentation showing a tax was paid in another jurisdiction.

The taxpayer comments that the legislature realized its lack of precision in wording and clarified the legislative intent so that "state" is now defined as "any other legally established taxing authority."

The issues presented by the taxpayer with respect to this first aspect are (1) whether the duty paid is a tax paid and (2) whether "state" includes the United States. Another issue raised by the language of the statute in effect during the audit period is whether the credit for tax paid applies if the fish was purchased outside the other taxing state.

2. The taxpayer seeks a correction of the measure of the tax as computed by the auditor.

The auditor cited RCW 82.27.020(3) as setting forth the measure of the tax to be "the price paid by the first person in possession of the food fish." The auditor held that additional amounts paid to Washington fishermen for delivering their fish to the taxpayer's dock were includable in the measure of tax.

The taxpayer asserts that the first person in possession is the fisherman who does not pay a set price; rather his price is his cost of catching the fish. That cost/price does not include his profit and does not include the cost of transportation from the fishing vessel to the taxpayer's plant in . . . , Washington. Therefore, the taxpayer contends that the measure of the tax should be the cost/price incurred by the first person in possession, the fisherman; not the price paid by the taxpayer.

The taxpayer sets forth three scenarios (A, B, and C) to illustrate its specific objections:

A. Some fish are delivered by the fisherman's catching vessel directly to the taxpayer's plant in The fisherman receives an amount equal to that which the taxpayer would have to pay a fish tender which bought the fish on the fishing grounds and transports the fish to the taxpayer's plant. The taxpayer reasons that it has been taxed incorrectly on the price paid to the fisherman for the fish plus the fisherman's transportation costs. In other words, the taxpayer

claims that where the fisherman transports the fish to the taxpayer's plant, the transportation cost of the fisherman should be excluded from the measure of the tax.

B. Some fish are delivered by a tender owned by or contracted to work for the taxpayer. In this scenario, the fisherman is paid by the taxpayer at a certain price for fish delivered by the fisherman to the tender on the fishing grounds. That price does not include transportation costs from the fishing grounds to the taxpayer's plant.

The tender operator, if the tender is not owned by the taxpayer, is paid a set amount per pound according to species for transporting the fish from the fishing grounds to the taxpayer's plant. If in fact the tender is owned by the taxpayer, the tender operator is merely paid a wage.

The taxpayer asserts that it has been taxed incorrectly when the transportation costs paid to a tender under contract are included in the measure of the tax.

C. Some of the fish were landed in British Columbia and purchased there by the taxpayer. Sometimes the taxpayer's own trucks were sent to Canada and returned with the fish. Sometimes the seller shipped the fish on its trucks to the taxpayer's plant in At other times, the fish was shipped by common carrier and, depending on the terms of the contract between the seller and the taxpayer, the common carrier was either paid by the seller or by the taxpayer.

With respect to the purchases from the Canadian vendors, the auditor did not include the transportation costs in the measure of the tax. The taxpayer has no quarrel with the auditor's measure of the tax in this instance but asserts that the taxable event occurred outside Washington; for further discussion of the taxable event aspect, see 3 below.

3. The taxpayer contends that in scenarios 2B and 2C above, the fish tax does not apply at all to the taxpayer because the taxable event occurred outside the state of Washington. The taxpayer points to RCW 82.27.020(1) and (3), and asserts there is no language in the statute referring to the first possession in Washington. Rather, it was only after the 1985 amendment of the statute that the words "in Washington" were added to the statute.

Thus, whereas the statute in pertinent part during the audit period stated:

(1) . . . The tax is levied upon and shall be collected from the owner of the food fish or shellfish whose possession constitutes the taxable event. The taxable event is the first possession by an owner after the food fish or shellfish have been landed

. . . .

(3) The measure of the tax is the price paid by the first person in possession of the food fish or shellfish . . .

.

The statute in pertinent part as amended in 1985 states:

(1) The tax is levied upon and shall be collected from the owner of the enhanced food fish whose possession constitutes the taxable event. The taxable event is the first possession in Washington by an owner [Note that here the clause, "after the food fish or shellfish have been landed," is not present.]

. . . .

(3) The measure of the tax is the value of the enhanced foodfish at the point of landing. (Bracketed words and underlining supplied.)

The taxpayer points out that it was not until 1985 that the definition of "landed" was included in RCW 82.27.010 and that definition states that landing refers to the product's arrival in the state of Washington.

The taxpayer asserts that, in scenario 2C above, the first possession by an owner after landing was by numerous Canadian fish companies. The taxpayer contends that consequently it owes no tax on fish purchased from the Canadian fish companies.

The taxpayer asserts that in scenario 2B above the first possession by it was outside Washington and thus not taxable.

The taxpayer points to the decision in Vita Food Products v. State 91 Wn.2d 132 (1978) as relevant and beneficial, and states in its petition:

The facts in that case were that the Quileute Indian tribe operated on its reservation a fish processing plant which purchased fish from both Indians and non-Indians.

The tribe processed the fish for resale to others, including Vita Food Products. The State attempted to levy the privilege tax upon Vita Foods, arguing that they were the first person handling the fish within the State of Washington in that the Quileute tribe was beyond the state taxing jurisdiction and that the statute was intended to apply to the first person receiving the fish which were subject to the taxing jurisdiction of the state.

The court stated:

The statute is clear on its face. It defines the original receiver as the first person actually, physically receiving the fish.

We should not and do not construe an unambiguous statute. Pope & Talbot, Inc. v. Department of Revenue, 90 Wn.2d 191 (1978); Snow's Mobil Homes, Inc. v. Morgan, 80 Wn.2d 283 (1972). The state would have us add words to the statute to ascribe legislative intent, i.e., that the legislature meant the first receiving person to mean the first person over whom taxing authority may be asserted. It is not within our power to add words to a statute even if we believe the legislature intended something else but failed to express it adequately. Jepson v. Department of Labor & Industries, 89 Wn.2d 384 (1977); Allen v. Employment Security Department, 80 Wn.2d 145 (1973).

Finally, the most basic rule of construction applicable to any revenue statute is that if any doubt exists as to the meaning of a taxing statute, it must be construed most strongly against the taxing authority and in favor of the taxpayer. See City of Puyallup v. Pacific Northwest Bell Telephone Company, 98 Wn.2d 443 and Shurgard Mini-Storage of Tumwater v. Department of Revenue, 40 W.App.721, see also Vita Food Products v. State.

4. The taxpayer, in its letter of September 10, 1986, also appealed against the assessment of interest in the amount of \$. . . on the grounds that it feels that it should not be further penalized for its "initial lack of experience in and understanding of the applicable law."

DISCUSSION:

The taxpayer has presented extensive detailed and pointed oral and written testimony. While the main arguments have been acknowledged in the foregoing Facts and Issues part of this Determination, the taxpayer may be assured that all of the argument details have been very carefully considered. Thus, if an item raised by the taxpayer is not specifically discussed hereinafter, it is not to be interpreted or construed that it has

been overlooked or ignored, but rather that it is not deemed to be a critical factor in determining the issue to be decided.

The four disputed aspects of the tax assessments will be discussed in the order presented.

[1] 1. Credit for payment of "duty" to the U. S. government.

The taxpayer seeks a credit under RCW 82.27.040 for the payment of customs duty in the amount of \$. . . to the U. S. government. The credit statute in effect during the audit period bears repeating at this time:

A credit shall be allowed against the tax imposed by RCW 82.27.020 upon food fish or shellfish with respect to any tax legally imposed and paid to another state by the taxpayer upon the same food fish or shellfish purchased in the other state. (Emphasis supplied.)

The taxpayer purchased the fish in Canada and paid import duty to the United States Government.

We do not question that a duty is a tax. Besides Blacks Law Dictionary's definition, *supra*, that "duty" is a "tax or impost due to the government," the American Heritage Dictionary defines "customs" as "a tax or duty imposed on imported and, less commonly, exported foods." Furthermore, Washington Digest Annotated refers to "customs duties" as "taxes on imports or exports." Furthermore, Excise Tax Bulletin (ETB) 438.04.08.195 uses the term "import taxes" in lieu of "import duties."

The taxpayer has urged that the word "state" which appears twice in RCW 82.27.040 be construed as including the country of the United States of America. The express mention of one thing in a statute excludes others not mentioned. Dominick v. Christensen, 87 Wn.2d 25 (1976). Words in a statute will be given their ordinary meaning, absent a statutory definition. Garrison v. State Nursing Board, 87 Wn.2d 195 (1976). The express mention of "state" combined with the commonly understood meaning of the word "state," indicates that a country is not included. See Simpson v. State, 26 Wn.App. 687 (1980).

In any event, even if we were to hold that the statute's "state" included the United States of America (which we do not), the statute's granting of a credit is for a "tax . . . paid to another state . . . purchased in the other state." In this case, the taxpayer paid the tax

(customs duty) to the United States but purchased the fish in Canada. Thus, we must conclude that the credit is not available to the taxpayer.

Subsequent to the audit period of January 1, 1982 through December 31, 1984, amended RCW 82.27.040 became effective on July 28, 1985. The amended credit statute reads:

A credit shall be allowed against the tax imposed by RCW 82.27.020 upon enhanced food fish with respect to any tax previously paid on that same enhanced food fish to any other legally established taxing authority. To qualify for a credit, the owner of the enhanced food fish must have documentation showing a tax was paid in another jurisdiction. (Emphasis supplied.)

The statute's "any other legally established taxing authority" is broad enough to include the United States government. The statute's "paid in another jurisdiction" includes payment in the United States. By changing the language of a statute, the legislature is presumed to intend a change in the purpose of the law. Chandler v. Otto, 103 Wn.2d 268 (1984). Legislative enactments are presumed to operate prospectively unless they are remedial or unless a contrary intent appears from the legislation. Marriage of Lewis, 45 Wn.App. 1 (1986). The enactment in 1985 with respect to "any other legally established taxing authority" in place of the former statute's "another state" is a clear indication that "state" in the former statute did not include the country of the United States.

Thus, the taxpayer will be entitled to the credit under the amended credit statute prospectively from July 28, 1985 on import duties paid on enhanced food fish to the United States against the tax imposed on the same enhanced food fish by RCW 82.27.020.

2. Correction of the measure of the tax.

In effect during the audit period of January 1, 1982 through December 31, 1984, and relevant to construing the measure of the tax, are these statutory provisions of RCW 82.27.020:

(1) . . . The tax is levied upon and shall be collected from the owner of the food fish or shellfish whose possession constitutes the taxable event. The taxable event is the first possession by an owner after the food fish or shellfish have been landed.

. . .

(3) The measure of the tax is the price paid by the first person in possession of the food fish or shellfish. If the food fish or shellfish are acquired other than by purchase or are purchased under conditions where the purchase price does not represent the value of the food fish or shellfish or these products are transferred outside the state without sale, the measure of the tax shall be determined as nearly as possible according to the selling price of similar products of like quality and character under rules adopted by the department of revenue. (Emphasis supplied.)

[2] The taxpayer argues that the measure of the tax should be the cost/price paid (based upon the expenses of catching the fish) by the fisherman as the first person in possession.

The measure of the tax obviously means the measure at the time of the taxable event which statutorily is "first possession by an owner after the food fish or shellfish have been landed." We must reject the taxpayer's argument because the fisherman's cost/price is not "after the food fish or shellfish have been landed." After the fish have been landed, there is a "price paid," a "purchase price," and a "selling price" terminology in the statute. These terms clearly indicate that the measure of the tax is based upon a buy/sell transaction, not upon a cost of fishing occurrence.

A. The taxpayer argues that where the fisherman transports the fish to the taxpayer's plant, the transportation cost charged to the taxpayer should be excluded from the measure of the tax.

[3] "The measure of the tax is the price paid . . ." RCW 82.27.020(3). The term "price paid" is not defined in the Washington Revenue Act. The balance of that provision offers some insight into exactly what the legislature intended to tax. The provision continues to explain the method of determining the measure of the tax in cases where the fish is acquired other than by purchase or are purchased under conditions where the purchase price does not represent the value of the food fish (after landing). In such cases, "the measure of the tax shall be determined as nearly as possible according to the selling price of similar products of like quality and character . . ." RCW 82.27.020(3).

RCW 82.08.010 Defines "selling price" (for retail sales tax purposes) as:

The consideration, whether money, credits, rights, or other property, expressed in terms of money paid or delivered by a buyer to a seller, all without any deduction on account of the cost of the tangible property sold, the cost of materials used, labor costs, interest, discount, delivery costs, taxes, or any other expense whatsoever paid or accrued (Emphasis supplied.)

The definitions contained in chapter 82.08 RCW are not expressly incorporated in chapter 82.27 RCW, but the term "selling price" nevertheless appears in RCW 82.27.020(3). This is a term charged with such meaning under the Washington Revenue Act that we must presume the legislature intended something by its use. We believe that the intent was to relate the fish tax concept of "price paid" to the retail sales tax concept of "selling price."

Consequently, we find that amounts paid by the taxpayer to a fisherman for the cost of transporting the fish from the fishing grounds to the taxpayer's plant (dock) are no more deductible from the "price paid" for fish tax purposes than such amounts would be deductible from the "selling price" for retail sales tax purposes. Thus, if the taxpayer pays 3 cents per pound for fish delivered by the fisherman to the taxpayer's plant (dock), the measure of the food fish tax is 3 cents per pound regardless of whether the taxpayer could have purchased the same fish from the fisherman at the fishing grounds (this is occurring before the fish have been landed) for only 2 cents per pound. We conclude that the auditor was correct in including in the measure of the tax the additional amounts paid to Washington fishermen for delivering their fish to the taxpayer's dock.

B. Here, the taxpayer argues that it is incorrect for the measure of the tax to include the transportation costs paid by the taxpayer to a tender under contract to the taxpayer for transporting the fish from the fishing grounds to the taxpayer's dock.

[4] We agree with the taxpayer. The Department may not include in the "price paid" amounts paid to tender-operators under contract to the taxpayer for transporting the fish from the selling fisherman on the fishing grounds to the taxpayer's plant. This is analogous to a retail sale in which the buyer accepts delivery of the goods at the seller's place of business

and makes his own delivery arrangements. In such cases, the "selling price" does not include the freight and delivery charges independently incurred by the buyer.

The audit report does not specifically indicate that transportation costs of the independent contracted tender were included in the measure of the tax. Based upon a prior determination of the same issue, the auditor was aware that such transportation costs were not includable in the measure of the tax. The auditor checked his notes and calculations in the matter and has confirmed that such transportation costs were not included in the measure of the tax. If the taxpayer can establish this factual matter to be otherwise, it should bring this to the attention of the auditor for proper adjustment.

C. Here, the taxpayer concedes that the auditor did not include the transportation costs in the measure of the tax. These transportation costs were incurred when the taxpayer purchased fish landed in Canada which were delivered to the taxpayer's plant by the seller, by common carrier, or by the taxpayer's own trucks.

3. Taxable event as occurring outside Washington.

Here, the taxpayer argues that in scenarios 2B and 2C above, the fish tax does not apply at all because the taxable event occurred outside the state of Washington, that is, in out-of-state fishing waters (2B) or Canada (2C).

"The taxable event is the first possession by an owner after the food fish or shellfish have been landed." RCW 82.27.020(1). Because the first possession was by an out-of-state fisherman or by a Canadian seller and the statute in effect during the audit period lacked the words "in Washington" after "first possession" so as to read "first possession in Washington" as it does now after the amendment effective in 1985, the taxpayer has construed the prior statute's language to exclude it from taxability.

[5] We do not agree. Washington has no jurisdiction to assert a tax on possession of fish outside of Washington. In our view, the words "in Washington" are so clearly implicit in the prior pertinent statute that their actual inclusion would be surplusage.

The taxpayer's urged interpretation of the law would extend an automatic exemption for any food fish brought into Washington from out of state because the fish would

have been landed, owned, and possessed elsewhere before being brought into Washington. In giving effect to the legislature's intent in enacting a statute, a court will consider the statute as a whole and harmonize it with related statutes. Stewart Carpet Serv., Inc. v. Contractors Bonding & Ins. Co., 105 Wn.2d 353 (1986); State v. Bernhard, 108 Wn.2d 527 (1987). If chapter 82.27 RCW is considered in its entirety, it is immediately apparent that the taxpayer's interpretation is incorrect. For example, RCW 82.27.030(1) provides an exemption for fish previously landed outside this state, but only if it shipped into Washington as frozen or packaged for retail sales. This express exemption would be totally useless and meaningless if all food fish purchased from out-of-state owner/possessors were automatically tax exempt. Nor would RCW 82.27.040, which provides a credit for taxes paid in other states, make any sense or have any effect. In short, the statutory law, on its face, refutes the taxpayer's argument.

The taxpayer has cited cases, Vita Food Products and other cases, as declaring that "if there is doubt as to the meaning of a taxing statute, it is to be construed in favor of the taxpayer and against the taxing body." We perceive no doubt as to the meaning of RCW 82.27.020(1) that the "taxable event is the first possession by an owner after the food fish or shellfish have been landed." The taxpayer has conjured up a doubt by bringing to its mind the possibility that "first possession" anywhere in the world outside Washington could be the taxable event. Of course, that isn't so.

The Vita Food Products case involved RCW 75.32.030, repealed in 1980, which imposed a "privilege fee" upon certain fish handlers who are the "original receivers" of such fish. The statute levies the privilege tax upon the "original receiver" statutorily defined as "the person first receiving, handling, dealing in, or dealing with the fresh . . . fish . . . within the state of Washington" The Quileute Indian Tribe operated on its reservation a fish processing plant which purchased fish from Indians and non-Indians. The tribe was the first person physically receiving and dealing in the fish within the activities described in the statute. The Tribe was beyond the taxing jurisdiction of the state of Washington. Vita Foods sought a declaratory judgment that it was not an "original receiver" as defined in the statute. The court agreed with Vita Foods that it was not an "original receiver" when it purchased from the Tribe. The state of Washington unsuccessfully argued that the statute was intended to apply to the

first person receiving the fish which is subject to the taxing jurisdiction of the state. The court refused to add words to the statute to ascribe legislative intent, i.e., that the legislature meant the first receiving person to mean the first person over whom taxing authority may be asserted. The court stated: "It is not within our power to add words to a statute even if we believe the legislature intended something else but failed to express it adequately."

In this case, the legislature has amply expressed its intent statutorily with the words: "The taxable event is the first possession by an owner after the food fish or shellfish have been landed." RCW 82.27.020(1). That "first possession in Washington" is clearly and indubitably intended is supported by the reasons set forth earlier. The 1985 amendments deleted the words "after the food fish or shellfish have been landed" and provided a definition for the word "landed" in RCW 82.27.010(5). These amendments related to the measure of the tax, not to where the taxable event occurred. Compare pre-1985's RCW 82.27.020(3): "The measure of the tax is the price paid by the first person in possession of the food fish or shellfish" with 1985's RCW 82.27.020(3): "The measure of the tax is the value of the enhanced food fish at the point of landing."

We conclude that, in scenarios 2B and 2C above, the fish tax does apply because the taxable event occurred in the state of Washington.

4. Assessment of interest.

The taxpayer appeals against the assessment of interest because it feels that it should not be further penalized for its "initial lack of experience in and understanding of the applicable law."

[6] RCW 82.32.050 in pertinent part provides:

If upon examination of any returns or from other information obtained by the department it appears that a tax . . . has been paid less than that properly due, the department shall assess against the taxpayer such additional amount found to be due and . . . shall add thereto interest at the rate of nine percent per annum from the last day of the year in which the deficiency is incurred until date of payment. (Emphasis supplied.)

The legislature, through its use of the word "shall" in RCW 82.32.050, has made the assessment of interest mandatory.

As an administrative agency, the Department of Revenue is given no discretionary authority to waive or cancel interest. The only authority to waive or cancel interest is found in RCW 82.32.105 which in pertinent part provides:

If the department of revenue finds that . . . the failure of a taxpayer to pay any tax by the due date was the result of circumstances beyond the control of the taxpayer, the department of revenue shall waive or cancel any interest . . . imposed under this chapter with respect to such tax. The department of revenue shall prescribe rules for the waiver or cancellation of interest . . . imposed by this chapter. (Emphasis supplied).

Administrative Rule WAC 458-20-228 (Rule 228) states the two situations under which a waiver or cancellation of interest will be considered by the Department as follows:

1. The failure to pay the tax prior to issuance of the assessment was the direct result of written instructions given the taxpayer by the department.
2. Extension of the due date for payment of an assessment was not at the request of the taxpayer and was for the sole convenience of the department.

The taxpayer's circumstances do not come within the above two interest-waiving situations, and were circumstances not "beyond the control of the taxpayer." Accordingly, waiver of the interest assessed is not possible in the circumstances involved in this case.

We point out that the assessment of interest upon tax deficiencies determined to be due by audit is routine and usual as well as mandatory. The taxpayer was not penalized; other statutes provide for penalties to be assessed but were not invoked against the taxpayer. Interest is simply assessed by statute upon monies due the state earlier which by reason of nonpayment have been at the use and disposal of the company.

DECISION AND DISPOSITION:

The taxpayer's petition is denied on all four aspects of the tax assessment. However, relative to aspect number 2B, if the taxpayer can establish that the auditor included transportation costs paid to its contracted

tender in the measure of the tax, then adjustments will be made to generate a credit or refund.

DATED this 14th day of September 1987.