

Cite as 5 WTD 61 (1988)

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

In the Matter of the Petition)	<u>D E T E R M I N A T I O N</u>
For Correction of Assessment of)	
)	No. 88-23
)	
. . .)	Registration No. . . .
)	
)	

[1] **RULE 249:** ARTISTIC AND CULTURAL ORGANIZATION --
DEFINITION -- ELIGIBILITY -- BOARD OF DIRECTORS. A
nonprofit corporation was found to be eligible for the
exemptions and deductions from excise tax as an artistic
or cultural organization, even though its Articles of
Incorporation specified a board of directors of less than
eight members. Taxpayer showed that, in fact, it had at
least eight members on its board throughout the audit
period.

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.

NATURE OF ACTION:

The taxpayer was denied the business and occupation (B&O) tax
deduction granted to artistic and cultural organizations by RCW
82.04.4322 et. seq., and WAC 458-20-249 (Rule 249), because its
Articles of Incorporation provided for only five Directors in
violation of RCW 82.04.4328. The taxpayer seeks a reversal of that
denial.

FACTS AND ISSUES:

Mastrodonato, A.L.J. -- The taxpayer is a nonprofit corporation
providing concerts and educational programs using woodwind
instruments. The taxpayer gives more than 100 concerts annually in
city parks, school rooms, libraries, and concert halls.

The Department of Revenue examined the tax returns filed by the
taxpayer and issued Tax Assessment No. . . . in the amount of \$.
. . . on October 8, 1987. The entire amount of the assessment
remains unpaid. For reasons set forth in detail below, the

taxpayer believes that neither tax, interest, nor penalties is due with respect to this taxpayer.

The issue in this matter relates to the business and occupation tax deduction claimed by the taxpayer pursuant to WAC 458-20-249 for the period January 1, 1985 through December 31, 1986. According to the audit report prepared by the Department, the deduction was denied on the grounds that the taxpayer's Articles of Incorporation provide for only five members on its Board of Directors. Under WAC 458-20-249, a qualified "artistic or cultural organization" must have at least eight individuals on its Board of Directors.

Although the taxpayer acknowledges the existence of the provision in its Articles of Incorporation referred to above, the taxpayer states that it has had at least eight members on its Board of Directors at all times during the period in question. To evidence this fact, the taxpayer submitted nine letters to the Department signed by individuals who have served on the Board of Directors. Eight of the people signing these letters served on the Board during the entire period in question. The ninth person served on the Board from September 1, 1986 through December 31, 1986. Consequently, in spite of the offending provision in the Articles, the taxpayer argues that its Board has consisted of at least eight individuals during the entire period of January 1, 1985 through December 31, 1986.

Thus, the taxpayer contends that it has complied with the literal requirements of the regulation. The taxpayer believes that the Department's inquiry into compliance with the regulation should be based upon the actual facts of each case rather than the terms of a document that, through an oversight, was not amended in a timely manner. (The taxpayer's Articles of Incorporation were amended in August, 1987, and now the Board of Directors consists of "no less than eight (8) directors".) The taxpayer argues that there is nothing in the regulation which would give precedence to the document over the actual facts. On the contrary, the taxpayer assumes that if the situation was reversed (the Articles providing for eight directors but, in fact, there being less than eight directors) the Department would deny the deduction based upon the facts even though inconsistent with the governing document. The taxpayer seeks to apply the same logic to the facts in the present case.

Finally, the taxpayer points out that most artistic and cultural organizations are relatively small operations run by individuals who are less sophisticated in legal matters than people running profit-making businesses. The taxpayer believes that it has complied with the law and should not be punished for its failure to satisfy an arguably irrelevant procedural matter.

DISCUSSION:

RCW 82.04.4328 defines the term "artistic or cultural organization" under the Washington excise tax laws. It provides in pertinent part:

The organization must be a not-for-profit corporation under chapter 24.03 RCW and managed by a governing board of not less than eight individuals none of whom is a paid employee of the organization or by a corporation sole under chapter 24.12 RCW. (Emphasis supplied.)

Rule 249, which is the administrative regulation adopted by the Department to implement this section of the Revenue Act, repeats this section of the statute in its entirety. Thus, it offers no additional guidance in interpreting the above statement.

The question presented for our consideration is whether, in order to claim the statutory exemptions and deductions from tax, the taxpayer's Articles of Incorporation must specifically provide for not less than eight individuals on its Board of Directors, or whether it is sufficient for a nonprofit corporation to satisfy the spirit and intent of the law if it, in fact, has at least eight directors, even though its Articles of Incorporation provide for a governing board of less than eight directors. We are inclined to follow the latter interpretation.

[1] Here, the taxpayer's original Articles of Incorporation provided for five members on its Board of Directors. This is consistent with the Washington Nonprofit Corporation Act which now requires the number of directors of a nonprofit corporation to consist of one or more individuals. RCW 24.03.100. As originally enacted, RCW 24.03.100 required the Board of Directors to be not less than three individuals. Thus, the taxpayer has always been a qualified nonprofit corporation under chapter 24.03 RCW.

The artistic and cultural organization excise tax exemptions and deductions were originally enacted in 1981. Chapter 140, Laws of 1981. The statutes were subsequently amended in 1985. See Chapter 471, Laws of 1985. The taxpayer organized on March 7, 1980. Thus, the excise tax definition, exemptions, and deductions were not even in existence at the time the taxpayer organized, incorporated, and came into existence. If the tax requirements were in place at that time, we are satisfied that the taxpayer would have made every effort to comply with those requirements.

Notwithstanding the provisions in the Articles of Incorporation, we find that the taxpayer did, in fact, comply with the excise tax requirements during all of the audit period in question. The taxpayer's Board of Directors consisted of at least eight individuals throughout the audit period. Although the Articles of Incorporation specified a board of only five members, the taxpayer maintained a board of at least eight individuals. Thus, we will

elevate substance over form and hold that the taxpayer maintained the requisite number of board members pursuant to RCW 82.04.4328.

We are further impressed with the fact that, once the taxpayer became aware that it did not meet the literal requirements of RCW 82.04.4328, the taxpayer amended its Articles of Incorporation. Consequently, the taxpayer's Board of Directors now consist of no less than eight individuals in conformance with RCW 82.04.4328.

In summary, we find that the taxpayer is a qualified nonprofit artistic or cultural organization under RCW 82.04.4328 and that it is eligible for all of the excise tax exemptions and deductions provided by RCW 82.04.4322 et. seq. This is because, in practice, the taxpayer has at least eight members on its Board of Directors, notwithstanding the fact that the taxpayer's Articles of Incorporation previously required only five directors.

DECISION AND DISPOSITION:

The taxpayer's petition is granted. The tax assessment in question is hereby cancelled.

DATED this 12th day of February 1988.