Cite as Det. No. 01-049, 21 WTD 212 (2002)

BEFORE THE APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition For Correction of Assessment	)	D E T E R M I N A T I O N
	)	No. 01-049
. . .	)	Registration No. . . .
	)	FY . . .
	)	Docket No. . . .
	)	Use Tax Assessment, Invoice . . .

. . .

[2] RCW 82.32.350: SETTLEMENT AGREEMENTS – METHODS – ACCORD AND SATISFACTION -- *EXPRESSIO UNIUS EST EXCLUSIO ALTERIUS.* Under the judicial doctrine of statutory construction *expressio unius est exclusio alterius*, the legislature, in designating only one method of compromising Washington tax liabilities under the Revenue Act, has clearly restricted taxpayers and the Department from any other methods of doing so – including accord and satisfaction under the provisions of Washington's Uniform Commercial Code.

[3] RCW 82.32.350: ACCORD AND SATISFACTION. Accord and satisfaction cannot occur when a cover letter is clearly inconsistent with the claim of accord and satisfaction notated on the check that it accompanies. North Bonneville v. Bencor Corp., 32 Wash. App. 144, 646 P.2d 161 (1982).

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:

Taxpayer objects to the imposition of use tax on a tractor, alleging . . . accord and satisfaction.[1]

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

FACTS:

Bauer, A.L.J. - It is uncontested that Taxpayer . . . , a Washington resident, purchased a . . . Tractor for $ . . . on March 3, 1996 in Oregon without payment of either retail sales or use tax. Taxpayer does not dispute he has used the tractor in the State of Washington.
On February 2, 2000 a Revenue Officer from the Compliance Division (Compliance) of the Department of Revenue (Department) assessed Taxpayer use tax in the amount of $ . . . , penalties in the amount of $ . . . , and interest in the amount of $ . . . , for a total of $ . . . .

On March 1, 2000 Taxpayer mailed a check for $ . . . (an amount equal to the tax assessment minus penalties and interest) to the Department. The check, which was also dated March 1, 2000, was deposited by the Department on March 6, and was annotated with the following language on both its face and reverse side:

> Donation in full settlement of Invoice 1 dated 2/2/2000.

In the letter accompanying his check, Taxpayer stated:

> I want to be fair and am willing to donate $ . . . in a full and complete settlement of this matter. . . . If the Department chooses to claim the $ . . . represents lawful taxes under the laws of the United States and that the Delinquent Penalty and Interest are also due, it has a burden of proof on the issue of lawful application of a power to tax, to assess a delinquent penalty, and to claim interest. . . . If the Department meets its burden of proof, I will immediately mail a check for $ . . . and admit I have paid a tax due, rather than a free will offering.

On March 21, 2000 the Revenue Officer mailed Taxpayer a letter acknowledging receipt of his payment. The Revenue Officer went on to explain the Washington State laws governing use tax (chapter 82.12 RCW), penalties (RCW 82.32.090), and interest (RCW 82.32.050). The Revenue Officer thereupon requested payment of the remainder of the use tax assessment (i.e., the amounts equal to the penalty and interest portion).

On April 13, 2000 the Revenue Officer received a letter from Taxpayer dated March 31, 2000. Taxpayer's letter contended that "the Department accepted my terms by endorsing, cashing, and receiving that amount of money from my bank as payment in full for your invoices. Paragraph three in my cover letter for the check states clearly the terms of the contract offered by the check."

On April 18, 2000 the Revenue Officer responded to Taxpayer's letter, explaining to him:

> The Department of Revenue has not accepted the "donation" as an offer of full settlement of the tax, penalty and interest liability.

> By appearance and wording this was not a true offer to settle this matter. The offer as submitted was based upon the premise that the tax was not due. You also stated that if the tax, penalty and interest were due that you would be forthcoming with the outstanding balance. In addition, neither you nor I can enter into a contract contrary to statute.
>
> As I noted in my prior letter, use tax, penalties, and interest have been in Washington statute for an extended period of time. The proper place for the question of whether this is constitutional is with the courts. The courts have not found the Revised Code of Washington, the state constitution, or use tax unconstitutional. Use tax is a valid tax and is due.
>
> Please submit $ . . . postmarked not later than April 21, 2000. A 10% delinquent penalty will apply after that date.
>
> Should you choose to schedule a supervisory conference, call me not later than Friday, April 21, 2000.

By letter dated April 24, 2000 Taxpayer responded with a request for a "conference by mail." The letter set forth many of the constitutional arguments presented in this forum. On May 1, 2000 the District Compliance Manager wrote Taxpayer explaining the application of the use tax to goods purchased in Oregon for use in Washington by Washington residents. The letter further explained why a waiver of interest and penalties would not be appropriate, and requested payment of $ . . . by June 2, 2000.

Taxpayer appealed to this Division on May 22, 2000.

TAXPAYER'S ARGUMENTS:

. . .

2. Accord and Satisfaction.

Taxpayer claims: "The Department may not repudiate the contract to settle this matter, which was agreed to on March 6, 2000 and fully executed on March 7, 2000." In alleging that he had a contract with the Department, Taxpayer contends the Department's retaining and depositing his March 1, 2000 check operates as a bar to the Department's further claim in this matter under the legal principle of "accord and satisfaction." Taxpayer alleges[2] the check had a "conspicuous statement to the effect that the instrument was tendered as full satisfaction of the claim" in accordance with RCW 62A.3-311, and that the Department has not "tendered repayment" of the "in full payment check" to Taxpayer as specified therein.[3] Taxpayer further asserts that this new

[2] Taxpayer correspondence dated November 13, 2000.

[3] Although, as explained in Taxpayer's first argument, above, Taxpayer does not concede the lawfulness of any of Washington's statutes.

version of this statute, as amended in 1993, effectively overrules the holding in North Bonneville v. Bencor Corp., 32 Wash. App. 144, 646 P.2d 161 (1982), which he believes provided that municipal officers could not compromise or release taxes except as specifically authorized by law.

Taxpayer argues that his actions, in what he considered to be a "bona fide dispute" with the Department, complied with the provisions of RCW 62A.3-311 in that his "donation" was made as a good faith offer to the Department and was mailed to the only address provided to him by the Department.

. . .

Taxpayer argues, especially, that accord and satisfaction can now be obtained against an "organization" – defined in RCW 62A.1-201 as now including a "government agency" – and that all the elements required for an accord and satisfaction have therefore been met.

ISSUES:

1. . . .

2. Whether there was a valid accord and satisfaction under Washington's Uniform Commercial Code when (a) Taxpayer's dispute of a tax assessment had no objective merit, and (b) when his cover letter was completely inconsistent with the accord and satisfaction language claim on the face of his enclosed check.

DISCUSSION:

. . .

2. Accord and Satisfaction. An "accord" is a contract between a debtor and creditor to settle a claim by some performance other than that which is due. "Satisfaction" occurs when the accord is performed. Plywood Marketing Assocs. V. Astoria Plywood Corp., 16 Wash. App. 566, 574, 558 P.2d 283 (1976). Any claim, whether disputed, unliquidated, or undisputed and liquidated, may be discharged by an accord and satisfaction. Harding v. Will, 81 Wn.2d 132, 138, 500 P.2d 91 (1972).

The Director is charged with carrying out the duties of the Department of Revenue. RCW 43.17.030; RCW 43.17.020. One of those duties is to "[a]ssess and collect all taxes and administer all programs relating to taxes . . . ." RCW 82.01.060. While the Director may delegate "any power or duty . . . ," he nevertheless retains responsibility for "the official acts of the officers and employees of the department." RCW 82.01.080.

One of the tools granted to the Director of the Department of Revenue by the legislature in carrying out his duty of "collecting all taxes" is the power to enter into settlement agreements. RCW 82.32.350 specifically provides:

> The department may enter into an agreement in writing with any person relating to the liability of such person in respect of any tax imposed by any of the preceding chapters of this title for any taxable period or periods.

RCW 82.32.360 provides:

> Upon approval of such agreement, evidenced by execution thereof by the department of revenue and the person so agreeing, the agreement shall be final and conclusive as to tax liability or tax immunity covered thereby, and, except upon a showing of fraud or malfeasance, or of misrepresentation of a material fact:
>
> (1) The case shall not be re-opened as to the matters agreed upon, or the agreement modified, by any officer, employee, or agent of the state, or the taxpayer, and
>
> (2) In any suit, action or proceeding, such agreement, or any determination, assessment, collection, payment, abatement, refund, or credit made in accordance therewith, shall not be annulled, modified, set aside, or disregarded.

Although the Department – i.e., the Director -- clearly has the discretion under RCW 82.32.350 and .360 -- but not the obligation -- to compromise (i.e., settle) any tax liability for less than the total amount of the tax due, there are specific requirements which must be fulfilled in order to do so. RCW 82.32.350 authorizes closing agreements but requires them to be "in writing." To be final and conclusive, the closing agreement must be "approved," which approval must be "evidenced by execution thereon by both the department of revenue and the person so agreeing." RCW 82.32.360. The current Director has delegated, in writing, the authority to settle certain types of tax liabilities, within prescribed dollar limits and situations, to a limited number of persons in management positions within the Department of Revenue.

Moreover, closing agreements -- statutorily required to be in writing, and approved by execution -- made by the Department and the taxpayer serve a purpose not present in non-tax settlements: the protection of state funds. Not only must these closing agreements be within the parameters of RCW 82.32.350 and .360, but the Department's administration of the tax laws is also subject to post-audit review by the State Auditor. *See* RCW 43.09.050 and RCW 43.09.290. The Department gives each Closing Agreement an individual serial number and the Department's Compliance Division maintain indices and background justification of those agreements for review only by the Auditor and those specifically authorized by RCW 82.32.330(1) to maintain taxpayer's privacy with regard to taxes.

Taxpayer asserts that RCW 62A.3-311 grants an alternate method for Washington taxpayers to compromise tax liabilities with the Washington Department of Revenue. We do not believe the legislature so intended.

[2] Under the judicial doctrine of statutory construction *expressio unius est exclusio alterius* (literally meaning: "the expression of one is the exclusion of the other"),[4] the legislative inclusion of certain items in a category implies that other items in that category are intended to be excluded. As stated in Bour v. Johnson, 122 Wn. 2d, 829, 836, 864 P.2d 380 (1993), "Legislative inclusion of certain items in a category implies that other items in that category are intended to be excluded." *See also:* Washington Natural Gas Co. v. Public Util. Dist. No. 1, 77 Wn. 2d 94, 98, 459 P.2d 633 (1969), Landmark Dev., Inc. v. City of Roy, 138 Wn.2d 561, 571, 980 P.2d 1234 (1999),[5] and State v. Roadhs, 71 Wn.2d 705, 707, 430 P.2d 586 (1967).[6]

Under the doctrine of *expressio unius est exclusio alterius*, the legislature, in designating only one method of compromising Washington tax liabilities under the Revenue Act, has clearly restricted taxpayers and the Department (i.e., the Director) from any other method of doing so. The Department's acceptance of Taxpayer's check, even though tendered in accordance with the terms of an accord and satisfaction under the provisions of RCW 62A.3-311, does not meet the statutory requirements of RCW 82.32.350 and .360 – i.e., a writing and both parties' approval evidenced by execution of a closing agreement, and, therefore, no contract under that analysis resulted.[7] Without a written, properly executed closing agreement executed in accordance with RCW 82.32.350 and .360, the Department does not have the legal authority to either refund or waive the collection of taxes. "No executive or ministerial officer has authority to refund taxes except under express statutory authority." (emphasis ours.) Guy Atkinson Co. v. State, 66 Wn.2d 570, 575, 403 P.2d 880 (1965).[7]

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[4] Many federal courts refer to this same doctrine by a variant of the Latin terminology: "*inclusio unius est exclusio alterius*" (the inclusion of one is the exclusion of the other). *See, e.g.*, U.S. v. Terrence, 132 F.3d 1291, 1997 U.S. App. LEXIS 36361 (9th Circuit, 1997).

[5] "Where a statute specifically designates the things or classes of things upon which it operates, an inference arises in law that all things or classes of things omitted from it were intentionally omitted by the legislature under the maxim *expressio unius est exclusio alterius* -- specific inclusions exclude implication."

[6] "Where a statute specifically designates the things to which it refers, there is an inference that all omissions were intended by the legislature, *expressio unius est exclusio alterius*."

[7] We therefore find it unnecessary to further review whether the requirements specified in RCW 62A.3-311 were satisfied.

[7] Other courts have held similarly in cases concerning claims of accord and satisfaction against the Internal Revenue Service:

> Appellant claims that there was an accord and satisfaction arising from the fact that appellant tendered a check for $ 100 in full settlement of the claims of the government against him. It is claimed that by indorsing and collecting this check an accord and satisfaction was established. Appellant cites numerous cases on this subject, none of which deal with transactions with the government. The collector who received the check had no authority to compromise the claim against the appellant by express agreement, much less by implication. . . . Botany Worsted Mills V. U.S., 278 U.S. 282 . . . [1929]. The assent of the Secretary of the Treasury is essential to a compromise of any civil case "arising under the internal-revenue laws." See Botany Worsted Mills v. United States, supra.

[3] Even if the Department might have been lawfully subject to an accord and satisfaction for payment of taxes under the provisions of RCW 62A.3-311, the March 1, 2000 cover letter accompanying Taxpayer's check demonstrated that no accord and satisfaction could have occurred in this particular situation. Taxpayer's letter stated, "If the Department meets its burden of proof, I will immediately mail a check for $ . . . and admit I have paid a tax due, rather than a free will offering." This statement of donative intent is clearly inconsistent with the claim of accord and satisfaction. *See also,* North Bonneville v. Bencor Corp., 32 Wash. App. 144, 646 P.2d 161 (1982) (wherein a taxpayer's cover letter was likewise inconsistent with the claimed accord and satisfaction notated on its check.)

Taxpayer's petition on this issue is denied.

DECISION AND DISPOSITION:

Taxpayer's petition is denied.

Dated this 30th day of April 2001.

(Hughson v. U.S., 59 F.2d 17, 1932 U.S. App. LEXIS 3297 (9th Cir, 1932), cert. denied, 287 U.S. 630 (1932).)

> This Court recognizes that normally a creditor, to whom a compromise payment for a disputed claim is made as constituting payment in full of such claim, has the choice of either accepting the payment with the condition or rejecting the offer completely. Where a creditor negotiates a check sent by the debtor with knowledge that it is offered in full satisfaction of disputed claim, the creditor thereby agrees to the condition and is estopped from denying his acceptance of the agreement. However, the courts have repeatedly held that such a negotiation cannot create an agreement binding on the [IRS]. Botany Worsted Mills v. U.S., supra; Hughson v. U.S., [supra]…

(Colebank v. U.S., T.C. Memo 1977-46, 1977 Tax Ct. Memo LEXIS 297 (1977). See also: Bowling v. U.S., 510 F.2d 112, 1975 U.W., App. LEXIS 15526 (5th Cir, 1975); Bunce v. U.S., 28 Fed. Cl. 500, 1993 U.S. Claims LEXIS 59 (1993).