

Cite as Det. No. 16-0324, 36 WTD 135 (2017)

BEFORE THE ADMINISTRATIVE REVIEW AND HEARINGS DIVISION  
DEPARTMENT OF REVENUE  
STATE OF WASHINGTON

In the Matter of the Petition for Correction of )	<u>D E T E R M I N A T I O N</u>
Assessment of )	
)	No. 16-0324
)	
... )	Registration No. . . .
)	

RCW 82.04.4266; RCW 82.32.585; 82.32.590; WAC 458-20-228; WAC 458-20-228: B&O TAX – EXEMPTION FOR FRUIT AND VEGETABLE MANUFACTURERS – ANNUAL SURVEY REQUIREMENT – CRITERIA FOR EXTENSION OF THE FILING DEADLINE. Taxpayer failed to timely file with the Department of Revenue (Department) the annual survey required to qualify for the business and occupation (“B&O) fruit and vegetable manufacturing tax exemption. The significant departure of employees around the time of the due date for filing the survey was not a circumstance that meets the criteria for extension of the deadline. Therefore, the Department properly denied Taxpayer’s request to claim the B&O tax exemption for manufacturing fruits or vegetables.

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.

Stojak, T.R.O. – A company that claimed a fruit and vegetable manufacturer [B&O] tax exemption, but failed to timely submit the required annual tax incentive survey, seeks review of the denial of its request for an extension to file the survey. The basis for the company’s Petition is that it experienced a significant departure of employees around the time of the due date for filing the survey due to a voluntary separation incentive program (“VSIP”). We conclude that the significant loss of employees to a VSIP does not amount to circumstances beyond the control of the taxpayer pursuant to WAC 458-20-228 (“Rule 228”). Petition denied.<sup>1</sup>

ISSUES

Does the loss of employees around the due date for filing an annual survey constitute circumstances beyond the control of the taxpayer that caused the late filing under RCW 82.32.590(1)?

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<sup>1</sup> Identifying details regarding the taxpayer and the assessment have been redacted pursuant to RCW 82.32.410.

## FINDINGS OF FACT

[Taxpayer] is a corporation that manufactures fresh refrigerated soups, entrees, chili, sauces, marinades, and gravy in Washington. When reporting and paying its B&O tax, Taxpayer claims an exemption under RCW 82.04.4266 for manufacturing fruits or vegetables pursuant to various processes. RCW 82.04.4266(3) requires taxpayers claiming this exemption to file an annual incentive survey under RCW 82.32.585.

On June 9, 2016, the [Department] sent Taxpayer a courtesy email warning that it had not received Taxpayer's annual incentive survey. The email stated "[i]f you filed late, or didn't file, then the amount of incentive that you claimed during the incentive year will be billed back to you. You will also be required to pay interest." The email also stated that an extension of the due date may be requested and instructed Taxpayer to explain the circumstances that caused the late filing if an extension was requested.

Taxpayer, that same day, emailed the Department back and requested an extension to file its 2015 annual survey. Taxpayer's email stated that the late filing was the result of "staffing changes." On June 10, 2016, the Department denied Taxpayer's request for an extension.

Taxpayer filed a Review Petition (Petition) objecting to the denial of its extension request. Taxpayer provided the following details in support of its Petition:

We have experienced a large loss of knowledge as a result of a VSIP which took place over the last 12 months. As background, on March 31, . . . announced a voluntary separation incentive program to its U.S. based salaried employees age 55 and older with at least five years of service. The window to elect into the VSIP closed on April 30, with 471 out of the 621 eligible employees electing into the program.

The filing of this survey was impacted by the loss of a manager and people on site who provide the data. As any employer of over 250 Washington State residents we are committed to filling the gaps and returning to our standard of on time filing.

DOR's records indicate that Taxpayer was granted a 90-day extension to file its 2012 Annual Survey.

## ANALYSIS

RCW 82.04.4266 provides a B&O tax exemption for certain manufacturers of fruit and vegetables. Pursuant to subsection (3) "[a] person claiming the exemption provided in this section must file a complete annual survey with the department under RCW 82.32.585."

RCW 82.32.585(1)(a) provides:

Every person claiming a tax preference that requires a survey under this section must file a complete annual survey with the department. (i) Except as provided in (a)(ii) of this

subsection, the survey is due by April 30<sup>th</sup> of the year following any calendar year in which a person becomes eligible to claim the tax preference that requires a survey under this section . . .

### 1. One-time 90-Day Extension

Notwithstanding the April 30<sup>th</sup> due date mandated by RCW 82.32.585, taxpayers are entitled to a one-time extension if certain conditions are met. RCW 82.32.590<sup>3</sup> provides the following criteria for entitlement to the one-time extension:

(3)(a) Subject to the conditions in this subsection (3), a taxpayer who fails to file an annual report or annual survey required under subsection (1) of this section by the due date of the report or survey is entitled to an extension of the due date. A request for an extension under this subsection (3) must be made in writing to the department.

(b) To qualify for an extension under this subsection (3), a taxpayer must have filed all annual report and surveys, if any, due in prior years under subsection (1) of this section by their respective due dates, beginning with annual reports and surveys due in calendar year 2010.

(c) An extension under this subsection (3) is for ninety days from the original due date of the annual report or survey.

(d) No taxpayer may be granted more than one ninety-day extension under this subsection (3).

Taxpayer was granted a 90-day extension to file its 2012 Annual Survey. Accordingly, Taxpayer is foreclosed from receiving an extension to file its 2015 survey pursuant to RCW 82.32.590(3)(d).

### 2. Circumstances Beyond the Control of the Taxpayer

Although Taxpayer does not qualify for the one-time ninety-day extension under RCW 82.32.590(3), the Department must nonetheless grant an extension if it finds that the failure to timely file the annual survey “was the result of circumstances beyond the control of the taxpayer.” RCW 82.32.590(1).<sup>4</sup>

In determining whether the failure to timely file an annual survey was the result of “circumstances beyond the control of the taxpayer,” WAC 458-20-268(11)(c) instructs the Department to apply the provisions in Rule 228 pertaining to the waiver of penalties assessed for the underpayment or untimely payment of taxes. Rule 228 explains that “[c]ircumstances beyond the control of the taxpayer are generally those which are immediate, unexpected, or in the nature of an emergency. Such circumstances result in the taxpayer not having reasonable time or opportunity to obtain an

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<sup>2</sup> Effective July 1, 2016, RCW 32.585(1)(a) was amended to provide a due date of May 31, 2016. See 2016 Wash. Sess. Laws Ch. 175 (SHB 2540).

<sup>3</sup> RCW 82.32.585(b) states that the department “may extend the due date for timely filing of annual surveys under this section as provided in RCW 82.32.590.”

<sup>4</sup> The extension granted under this subsection “is for a period of thirty days from the date the department issues its written notification to the taxpayer that it qualifies for an extension under this section.” The department may grant additional extensions under this subsection “as it deems proper.”

extension of the due date or otherwise timely file[.]” Rule 228(9)(a)(ii). The circumstances must directly cause the late filing. Rule 228(9)(a)(i).

Rule 228(9)(a)(ii) lists examples of circumstances that are beyond a taxpayer’s control sufficient to cancel penalties. One such circumstance is when the “delinquency was caused by the unavoidable absence of the taxpayer or key employee, prior to the filing date.” Rule 228(9)(a)(ii)(D). However, Rule 228(9)(a)(ii)(D) states that the “unavoidable absence of the taxpayer” does not include absences which are the result of “business trips, vacations, personnel turnover, or terminations.” *See* Det. No. 07-0221, 27 WTD 6 (2008). Thus, the demarcation drawn by Rule 228(9)(a)(ii)(D) between employee absences that amount to circumstances beyond the control of the taxpayer, and those that do not, is whether the absence is truly unavoidable or whether it is within the spectrum of absences a business should reasonably expect and plan for.

Taxpayer undoubtedly faced challenges in meeting its tax obligations after losing 471 of its employees over the age of 55, including the manager and other employees directly responsible for the annual incentive survey filing. However, the loss of employees resulting from the implementation of the VSIP, although significant, was not of an unexpected or unavoidable nature. As acknowledged by Taxpayer, the VSIP took place over a 12-month period, and there is no indication that the participation of key employees in the program was unexpected or sudden. That a significant loss of employees would ensue from the implementation of the VSIP could reasonably have been expected and planned for by the Taxpayer.

In summary, no basis existed for granting Taxpayer’s request for an extension to file the annual survey required under RCW 82.32.590. Accordingly, the Department’s denial of the request is upheld.<sup>5</sup>

#### DECISION AND DISPOSITION

[Taxpayer’s] petition is denied.

Dated this 4th day of November 2016.

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<sup>5</sup> Pursuant to RCW 82.32.585(a) “if a person claims a tax preference that requires an annual survey under this section but fails to submit a complete annual survey by the due date of the survey or any extension under RCW 82.32.590, the department must declare (i) the amount of the tax preference claimed for the previous calendar year to be immediately due [.]”<sup>5</sup> Accordingly, because RCW 82.04.4266 conditions full entitlement to the exemption it grants on the timely filing of an annual incentive survey, and there is no basis for granting an extension under RCW 82.32.590, the exemption claimed on Taxpayer’s 2015 returns is immediately due.