Cite as 1 WTD 245 (1986)

BEFORE THE DIRECTOR
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition For Correction of Assessment of . . .	F I N A L D E T E R M I N A T I O N No. 86-268 Registration No. . . . Tax Assessment No. . . .

[1] RULE 100 (2) - RCW 82.32.300 - APPEALS - PETITIONS - TIMELY -PREMATURE FILING. Petitions for review should be directed to the Interpretations and Appeals Section, should be identified as a petition for correction of assessment and must be filed after an assessment has been issued.

[2] RULE 100 (3) - RCW 82.32.600 - APPEALS - FAILURE TO FILE - ASSESSMENTS - FINALITY. If a petition for correction of assessment is not filed within the twenty day time period or within the period covered by any extension, then the assessment becomes final and the Department loses all further jurisdiction.

These headnotes are provided as a convenience for the reader and are not in any ay a part of the decision or in any way to be used in construing or interpreting this Determination.

NATURE OF ACTION:

An audit was conducted on the taxpayer for Enhanced Food Fish tax liability under RCW 82.27 et. seq. As a result of that audit, an assessment was issued on May 30, 1986 and a due date for payment was established for June 24, 1986. Payment has not been made and the account is now delinquent.

FACTS AND ISSUES:

GARRY G. FUJITA, CHIEF--The Department conducted a partial audit of this taxpayer for Enhanced Food Fish tax liability in 1985. In November of 1985, the auditor, the audit supervisor and the taxpayer's attorney discussed the potential audit assessment with the view of resolving the dispute. The meeting was a failure from the taxpayer's perspective, because the matter was not resolved favorably.

The taxpayer was given a second opportunity to persuade the audit section that the proposed assessment was wrong. On February 3, 1986, the taxpayer's attorney forwarded a memorandum of law as well as evidence which included various exhibits and affidavits. It was therein argued with factual and legal
analysis that the tax could not lawfully be assessed.

After review of the taxpayer's arguments and information, the audit section still did not deviate from its position that the tax was due. It was on March 17, 1986 that the auditor formally responded to the taxpayer by forwarding his "detail of differences"[1]. This response, however, did not specifically answer the attorney's legal memorandum point for point; the correspondence simply stated that the auditor was still not convinced that the taxpayer was correct even after considering the conferences with and the memorandum by the taxpayer's attorney. There remained documentary evidence from third parties that the auditor could not reconcile in the taxpayer's favor. The auditor in the "detail of differences" provided the taxpayer with a copy of Rule 100 (WAC 458-20-100) which in paragraphs two and three explained the taxpayer's rights of appeal. (A copy of the auditor's "detail of differences" is attached as Exhibit A and incorporated herein by reference thereto.)

On May 30, 1986, the Department's administrative processing of the taxpayer's audit was completed and an assessment was issued setting a due date for payment on June 24, 1986. The taxpayer did not file a petition under Rule 100 or pay the tax before the stated due date of June 24, 1986.

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[1] The auditor's "detail of differences" is a written document that is provided to each taxpayer who has adjustments made as a result of an audit. The document explains why the adjustment to the taxpayer's account was made.

On September 15, 1986, nearly three months after the date the petition for correction of the assessment should have been filed, the taxpayer asked that the assessment be reviewed.

The taxpayer argues on the procedural matters that the taxpayer never agreed to the assessment (the taxpayer states: ". . . we also strongly feel we don't owe anything on the transactions in question.") and that the memorandum of law and various exhibits filed with the auditor on February 3, 1986 constitutes a timely filed petition. Further, the taxpayer believes it is entitled to an explanation of the Department's review of the February 3 legal memorandum submitted by its attorney.

DISCUSSION:

This analysis must limit itself to whether the Department will accept anything the taxpayer or the taxpayer's attorney has submitted to date as a timely filed petition under the governing statutes and regulations. Since this matter is procedural, the question of whether the assessment is valid is not reached.

Under RCW 82.32.300, the Legislature has given the Department of Revenue the power and authority to adopt rules for the determination of tax under RCW 82.04 through 82.27. That statute in pertinent part is set forth as follows:

> The administration of this and chapters 82.04 through 82.27 RCW of this title is vested in the department of revenue which shall prescribe forms and rules of procedure for the determination of the taxable status of any person, . . . for the ascertainment, assessment and collection of taxes and penalties imposed thereunder.

Rule 100 (2) is the Department's exercise of that authority and is set forth as follows and as is pertinent:

> (2) Any person having been issued a notice of assessment of additional taxes, delinquent taxes, penalties or interest may petition the department of revenue in writing for a correction of the amount of the assessment and a conference for examination and review of the assessment. Petitions should be addressed: State of Washington, Department of Revenue, Interpretations and Appeals Division, Olympia, Washington 98504.

RCW 82.32.160 is the Legislature's direction regarding some of the things over which the Department has discretion and the things of which are mandatory and are not subject to discretion. The relevant portions are set forth as follows:

> . . . The department shall promptly consider the petition and may grant or deny it. If denied, the petitioner shall be notified by mail thereof forthwith. If a conference is granted, the department shall fix the time and place therefor and notify the petitioner thereof by mail. After the conference the department may make such determination as may appear to it to be just and lawful . . . . If no such petition is filed within the twenty day period the assessment covered by the notice **shall** become final. (Emphasis added.)

Rule 100 (3) implements RCW 82.32.160 and is relevantly set forth as follows:

> (3) Under the law the petition must be received . . . within twenty days after the issuance of the original notice of the amount of the deficiency, or within the period covered by any extension of the due date granted by the department. . . . If no petition is filed within these time periods, the assessment covered by the notice shall become final. (Emphasis added.)

[1] Under Rule 100 (2), the procedure prescribed by the Department permits a taxpayer to petition the Department for a review after a notice of assessment has been issued. This petition should be in writing and should be addressed to the Interpretations and Appeals Division of the Department of Revenue.

In this case, the notice of assessment was issued on May 30, 1986. There is no dispute that the Interpretations and Appeals Section (formerly referred to as "Division") did not receive anything, much less a petition, from the taxpayer or its representatives until September 16, 1986. The taxpayer argues that the memorandum filed with the auditor on February 3, 1986 should be considered the petition.

We reject that contention. First, the memorandum was not addressed to the Interpretation and Appeals Division and does not represent itself in any manner as a petition "for a

correction of the amount of the assessment" (see Rule 100 (2) supra.).

Second, it was impossible for the memorandum to be a petition "for a correction of the amount of the assessment", because at the time it was given to the audit section no assessment had been issued. The memorandum was filed with the auditor on February 3, 1986; the assessment was issued May 30, 1986, almost four months later.

Third, which by itself is dispositive of the issue, the taxpayer was given a copy of Rule 100 which explained how to perfect an appeal. The auditor's "detail of differences" to the taxpayer specifically referred to the rule as assistance for perfecting an appeal. Whatever the reason might be for the taxpayer's lack of understanding, short of fraud on the part of the auditor to deprive the taxpayer of an appeal, is not defensible. There is absolutely no evidence that the auditor conducted himself in anything but a forthright fashion.

The taxpayer did not follow the rule, it theoretically asked for the review of an assessment before one was issued and it had actual receipt of a copy of Rule 100. It is up to each taxpayer to appreciate its rights and to be informed of what those rights might be. There is no duty of which we are aware that requires the Department to do anything more than what it has done in this case.

While we appreciate that the taxpayer may view this as a bureaucratic technicality, we do not so agree. The Department of Revenue is a large agency that has been organized to accomplish its statutory mandate to determine and collect where lawfully due taxes owed to the state. That process includes reviewing a taxpayer protest of an assessment. The rule provides how, when and where to perfect an appeal. The appeal procedure deliberately removes the appeals from the auditors to the administrative law judges to assure an impartial review of the assessment. Because of the size of the Department and the volume of paper (millions of pieces) and appeals filed (there is currently over 550 appeals filed annually), rules must be adopted and followed if this organization is to run in an orderly and efficient manner.

Just as a business establishes various divisions to handle certain aspects of its operations (e.g., accounts receivable, marketing, purchasing and other) so does the Department. Just as a business would expect to have sellers deal with the

purchasing division and the business's customers deal with the marketing division, there is nothing arbitrary about the Department expecting taxpayers to deal with its duly organized divisions or sections. The chaos that would be created if the business's customers used the accounts receivable division to process a purchase is no less than what would happen with the Department if its rules are not followed.

There has been no timely filed petition in this case. There can be no assurance that a memorandum filed with the Audit Section (and not Interpretation and Appeals) before an assessment has even been issued (and that is not denominated as a petition for review of an assessment) would ever be forwarded to the Interpretation and Appeals Section and treated as a timely filed petition. To expect that would be no different than expecting the accounts receivable division of business to process a purchase order for the marketing division.

[2] Even if one could assume that this is an overly technical interpretation, RCW 82.32.160 and its Rule 100 (3) would prohibit the Department from taking any further administrative action. We view RCW 82.32.160 as jurisdictional. Paraphrased, it states that if no petition is filed within the stated time frame, the assessment shall become final. The statute is mandatory by its use of the word "shall" and therefore, the Department is afforded no discretion to treat a final assessment as something other than final.

The taxpayer may again believe that this is bureaucratic nonsense, however, there is sound rationale for this position. While we cannot say with certainty what was intended by the Legislature, we believe that the Legislature had two interests that it was trying to accommodate when it adopted RCW 82.32.160. One interest was to protect the taxpayer from assessed amounts that were incorrectly demanded. In order to protect the taxpayer from erroneous tax collection, the Legislature provided for review by the Department, the Board of Tax Appeals and the court system. The procedure described in Rule 100 is the Department's fulfillment of the first review mandated by the Legislature.

A second competing interest that we believe the Legislature wanted to protect was the timely receipt of revenues. Just as any business relies upon payment from its customers to operate, similarly does the state rely upon collection of taxes. In this regard, we believe that the Legislature realized that some taxpayers would abuse the system of

administrative review to deliberately and perhaps indefinitely delay the payment of taxes.

Thus, in order to meet a common ground between the two competing interests, the Legislature adopted the RCWs earlier referred. To again paraphrase, it said to the Department that it should review the assessments and determine if the assessments are correct. But, if the taxpayer does not initiate a review within the time limits set forth, the assessment shall become final. In this way the Legislature provided what it believed would be an appropriate amount of time to protest the assessment (twenty days from the notice of assessment) to assure that the taxpayer had a chance to question the assessment and secondly, it made any assessment final if the taxpayer was dilatory and filed no petition for correction. Such a result assures the timely collection of the taxes due. To further assure timely collection the Legislature has declared when an assessment becomes final and it has provided no discretion to the Department to alter that determination.

DECISION AND DISPOSITION:

The taxpayer's petition for review is denied. This decision may be reviewed under RCW 34.04.070. The assessment may be reviewed by filing a petition with the Board of Tax Appeals under RCW 82.03.190 or by instituting a suit in Thurston County Superior Court for refund under RCW 82.32.180.

DATED this 10th day of October 1986.