

Cite as Det. No. 00-033, 19 WTD 719 (2000)

BEFORE THE APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Revocation of Credit of)	<u>D E T E R M I N A T I O N</u>
)	
)	No. 00-033
)	
...)	Registration No. ...

RULE 240: B&O TAX – CREDIT – MANUFACTURERS IN DISTRESSED AREAS – NEW HIRES – LONGEVITY. To retain eligibility for the B&O tax credit for new hires at a facility in a distressed area, a manufacturer must keep the new positions filled for a period of twelve consecutive months. Additionally, its new hires must cause its employment level for the tax year to exceed its employment level for the previous tax year by 15 percent.

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:

Manufacturer appeals revocation of B&O tax credit for new hires in distressed area.¹

FACTS:

Dressel, A.L.J. -- ... (taxpayer) manufactures and ... artist supplies. For the tax years 1997 and 1998 the taxpayer applied to the Department of Revenue (Department) for B&O tax credit as a manufacturer making new hires in a distressed county. On its applications for the credit, the taxpayer projected that it would hire 15 new workers in 1997 and ten in 1998. The Department granted the credit applications by issuing Business and Occupation Tax Employee Credit Certificates ... and ..., respectively. Subsequently, however, the Department rescinded the 1997 and 1998 credits in a letter and audit report dated February 5, 1999. As reasons it stated that the 1997 new hires were laid off less than one year after they became employed and the taxpayer's level of employees in 1998 never exceeded the 1997 level by the required 15 percent.

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

In protesting the Department's withdrawal of its credit, the taxpayer states that it had a serious downturn in its business volume in 1998 due to the strength of the U.S. dollar and the fact that a significant portion of the taxpayer's products are sold at export. Because of this downturn, it was forced to lay off many of the workers it hired in 1997. This was a development the taxpayer did not anticipate. Up until 1998 the business had enjoyed 10 years of continued growth. The taxpayer states that it relied, heavily, on the B&O tax credits at issue. It made considerable "infrastructure" investments in reliance on those credits that it cannot now undo. Moreover, business has since picked up, and the company's historic growth patterns and employment levels have been restored. During its time of trouble, the taxpayer relied, to a large extent, on temporary job services to furnish necessary workers. In the first quarter of 1999, however, the taxpayer hired 19 direct, permanent, full-time employees. The taxpayer says it is more than willing to hire aggressively when work is available. In having its B&O tax credits revoked, the taxpayer feels it is being unfairly punished for a temporary deflection in business volume. The taxpayer believes that it has complied with the spirit, if not the letter, of the law. It would not object to rescission of the credits if it does not maintain the employment levels to which it agreed with the Department for 1999.

ISSUE:

Should a manufacturer, that previously qualified for a B&O tax credit for new hires in distressed counties, lose that credit because it laid off employees.

DISCUSSION:

The B&O tax credit at issue here is authorized at RCW 82.62.030, which, at the time of the taxpayer's application for 1997 tax credit,² read, in part:

Allowance of tax credits--Limitations. (1) A person shall be allowed a credit against the tax due under chapter 82.04 RCW as provided in this section. For an application approved before January 1, 1996, the credit shall equal one thousand dollars for each qualified employment position directly created in an eligible business project. For an application approved on or after January 1, 1996, the credit shall equal two thousand dollars for each qualified employment position directly created in an *eligible business project*. (Italics ours.)

An "eligible business project" means:

manufacturing or research and development activities which are conducted by an applicant in an eligible area at a specific facility, provided the applicant's average full-time qualified employment positions at the specific facility will be at least fifteen percent greater in the year for which the credit is being sought than the applicant's average full-time *qualified employment positions* at the same facility in the immediately preceding year. (Italics ours.)

² RCW 82.62.030 was amended in 1997 and in 1999.

RCW 82.62.010(4)(a). WAC 458-20-240 (Rule 240) implements Chapter 82.62 RCW. It reads, in part:

(h) "Qualified employment position" means a permanent full-time employee, employed in an eligible business project during the entire tax year: PROVIDED, That,

(i) Once a full-time position is established and filled it will continue to qualify for tax credit purposes so long as it is filled by any person or, during any period of vacancy, the employer is training or actively recruiting a replacement employee;

(ii) A position will not be deemed to be filled in order to qualify for tax credit if it is vacant for any period in excess of thirty consecutive days;

(iii) *The requirement for employment during the "entire" tax year will be satisfied if the full-time position is filled for a period of twelve consecutive months.*

(Italics ours.)

[1] With respect to 1997, the positions in question were *not* filled for a period of twelve consecutive months. Although this explanation of a "qualified employment position" appears in a regulation, as opposed to a statute, we note that "[t]he department of revenue shall make and publish rules and regulations, not inconsistent therewith [Chapters 82.04 through 82.27 RCW]" RCW 82.32.300. The pertinent provision of Rule 240 is not inconsistent with the relevant statutes found in Chapter 82.62 RCW. Therefore, that provision is controlling. Additionally, we observe that Rule 240 goes on to state:

(27) Perfecting approved credits. In order to perfect its entitlement to any credits approved and legally use such credits against business and occupation tax due, a recipient must actually hire the required number of qualified employment positions to comply with the application upon which tax credits were approved. Such created positions must be maintained for a continuous period of twelve consecutive months. (See the definition of "qualified employment position" at subsection (3)(h) of this section.) The law establishes a "look-back" test at the end of the credit computation year to determine that the tax recipient has complied.

For purposes of administering this program the department will consider a period of twelve consecutive months of employment to satisfy the definition of "qualified employment position," to perfect the entitlement to tax credits used.

As to 1998, the taxpayer failed to increase its employment level by 15 percent, as it projected it would do in its application for B&O credit. The 15 percent increase is a *statutory* requirement, as well as a rule requirement. See RCW 82.62.030(4)(a), *supra*.

While we have no doubt of the taxpayer's good intentions here, we have no authority to ignore the statutory and regulatory requirements for the B&O tax credit.

DECISION AND DISPOSITION:

Taxpayer's petition is denied.

DATED this 29th day of February, 2000.