Cite as Det. No. 99-172, 19 WTD 277 (2000)

BEFORE THE APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition For Refund of Forest Excise Tax	)	D E T E R M I N A T I O N
	)	No. 99-172
. . .	)	Registration No. . . .
	)	Forest Excise Tax Assessment # . . .

[1] RCW 84.33.041; RCW 82.23.096; WAC 458-40-634: FOREST EXCISE TAX – SMALL HARVESTER – CHANGE IN DEFINITION OF SMALL HARVESTOR. Effective July 1, 1995, the definition of small harvester was expanded to include individuals who harvest not more than two million board feet of timber per year. This change in definition requires consideration of 1995 small harvester activities under the one million board feet limitation for the first two quarters and the two million board feet limitation for the last two quarters.

[2] RCW 84.33.041; RCW 82.23.096; WAC 458-40-680; WAC 458-40-610: FOREST EXCISE TAX – NO PROVISION FOR RETROACTIVE APPLICATION OF LOG CATEGORIES. Lumber rate tables and categories expressly apply to a specific time period, and the subsequent creation of a category that more accurately describes the taxpayer's lumber does not provide a basis for retroactive application of that category.

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 petitions for refund of portion of a forest excise tax assessment based upon the assertion that the categorization of certain quantities of lumber, which was sold by weight rather than scaled, was improper as there was no appropriate category available for this type of lumber at the time in question. [1]

FACTS:

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

Kreger, A.L.J. (reassigned from Dressel, A.L.J.) –. . .([T]he taxpayer) is a Washington corporation, which engages in timber harvesting activities. In October of 1996, the Forest Tax Division of the Department of Revenue conducted an audit or the corporation's business activities for the period of January 1, 1992 through December 31, 1995. As a result of this audit, it was determined that the taxpayer had improperly reported portions of the timber harvested under the classification of Conifer Utility where the lumber had not been scaled as required. Therefore, this timber was reclassified as Lodgepole Pine, which was the lowest quality sawlog category available at that time. As a result of the change in category for the timber at issue, it was determined that the taxpayer had failed to pay the proper amount of forest excise tax due and on November 29, 1996, assessment #. . . in the amount of $. . . (comprised of $. . . of forest excise tax and $. . . in statutory interest) was issued to the corporation. The taxpayer paid the assessment in its entirety and has petitioned for a refund in the amount of $. . . .

The taxpayer timely filed a petition contesting this assessment and requested that $. . . ($. . . plus $. . . in interest) be refunded based on the assertion that the reclassification of the timber resulted in an unfair and unreasonable assessment. The taxpayer requests that this amount be refunded so as to reach a "fair and reasonable" assessment. The taxpayer protests the portion of the assessment issued, which disallowed the use of the Conifer Utility (CU) Rate and asks that the tax due on this timber be based on the amount of revenue that the taxpayer actually received for the timber at issue rather than the under the Lodgepole Pine category assigned to this timber by the Forest Tax Division. The Lodgepole Pine category was the lowest category or classification available at that time.

The taxpayer commenced business operations as a Washington Corporation in 1993 and the taxpayer contends that it "had no previous experience regarding the rate charts" in general and the CU classification in particular. The taxpayer does not dispute that the timber in question was not scaled as required to validate the volume of timber being sold or purchased. Rather, the taxpayer contends that during the period of time in question the Department did not have an "appropriate category" for this type of "merchandiser" wood. The taxpayer stated that the phrase "merchandiser wood" is how the timber in question is labeled by mill and that this designation describes timber that is not suitable for lumber.

The petition acknowledges that the Department's tax reporting instructions require "sample scaling" for CU reporting, but states that as the forms and instructions are sent out to taxpayers at the end of the quarter for the first quarter or reporting the taxpayer was not aware of the requirement. The timber at issue was not scaled by the taxpayer as it was sold by the ton to the mill. The taxpayer stated that the mill normally does the scaling of timber, but they did not scale the timber at issue and rather weighed it.

Correspondence from the purchaser of the timber in question has been provided, which states that the timber consisted of "merchandiser loads" with a top log diameter between four and six inches and that many of the load purchases were "pups," which are defined as "short-length loads averaging approximately 16 feet 6 inches rather than the traditional 33 feet." The

purchaser also states that in their opinion, "reasonable care and effort" was taken by the taxpayer to "keep the wood on these loads sorted as either merchandiser or as sawlog."

As the result of a public hearing process, changes were made to the reporting classifications for timber and a rate chart and a Small Log category was added. The taxpayer contends that had this Small Log category been available at the time the returns in question were filed, the timber at issue would have been reported in this category. The taxpayer also asserted that tax should be collected on the actual sales figures and that the subsequent changes to the timber excise tax, expanding the definition of who may qualify as a small harvester by increasing the maximum number of board feet which may be harvested in a year and the addition of the Small Log reporting category, reflect that the manner of taxing the timber at issue was inequitable.

Records provided by the Forest Excise Tax Department provided the following information. The taxpayer's quarterly harvest volumes in million board feet for the periods at issue were as follows:

1993: 4Q = 3,468
1994: 1Q = 440, 2Q = 4,165, 3Q = 2,109, 4Q = 468; – total = 7,182
1995: 1Q = 353, 2Q = 157, 3Q = 14, 4Q = no return available; – total = 524

In January of 1996, an amended return of the third quarter of 1995 was filed by the taxpayer changing their reporting classification to that of a small harvester. The change in reporting classification resulted in a credit of $. . . to the taxpayer. This is the only return the taxpayer has filed between the beginning of 1996 and the present time as a small harvester.

ISSUE:

Whether the reclassification for unscaled timber from the category of Conifer Utility to Lodgepole Pine was improper because subsequent changes to the laws governing the taxation of timber have provided different reporting options.

DISCUSSION:

The forest excise tax is imposed on every person engaging in this state in business as a harvester of timber on privately or publicly owned land. RCW 84.33.041. The harvester is the person, who either directly or by contracting with others for the necessary labor or mechanical services, fells, cuts, or takes timber for sale or for commercial or industrial use. RCW 84.33.035(4).

Timber is considered harvested at the time the volume is first determined, that is, at the time of scaling. RCW 84.33.035(3). The forest excise tax is measured by the stumpage value of timber. RCW 84.33.041. The stumpage value of timber is defined by the legislature as "the appropriate stumpage value shown on tables prepared by the department of revenue under RCW 84.33.091". RCW 84.33.035(5).

Thus, the legislature has provided that the forest excise tax is measured, not by actual revenue, but on the basis of stumpage value as determined by the Department. Only if a harvester meets the definition of a "small harvester" may the actual gross receipts from sale of the harvested timber minus the costs of harvesting and marketing the timber be used to establish taxable value. RCW 84.33.072 and RCW 84.33.074.

Effective July 1, 1995, the definition of small harvester was amended. For periods before July 1, 1995, in order to qualify as a small harvester it was necessary that "an amount not exceeding five hundred thousand board feet" be harvested in a single quarter and that an amount "not exceeding one million board feet" be harvested annually. WAC 458-40-634 effective 8/1/93-1/29/96; RCW 82.33.096. After July 1, 1995, the definition was changed so that a harvester who harvests timber "in an amount not exceeding two million board feed in a calendar year" may elect to file as a small harvester. WAC 458-40-634; RCW 82.32.330, 84.33.096, 84.33.120.

WAC 458-40-660 sets forth the stumpage value tables and presently includes a small log category. WAC 458-40-650, which defines the timber quality codes and became effective June 31, 1995, includes the classification for small logs. This classification is defined by WAC 458-40-610, and reads in pertinent part:

> e) Small logs. All conifer logs harvested in stumpage value areas 6 or 7 generally measuring seven inches or less in scaling diameter, delivered to and purchased by weight measure at designated small log destinations that have been approved in accordance with the provisions of WAC 458-40-670(6). Log diameter and length is determined by merchandizer scanner with length not to exceed twenty feet.

During the period in question, however, this small log category was not available and a sample scale was required to validate the volume of the timber being sold or purchased. WAC 458-40-680. The taxpayer's petition asserts that the subsequent creation of this category should provide a basis for adjusting the manner in which the timber in question was taxed.

Rules of statutory construction apply to the interpretation of administrative rules and regulations. *Multicare Medical Ctr. v. Department of Social & Health Servs.*, 114 Wn.2d 572, 591, 790 P.2d 124 (1990). Generally, amendatory acts apply prospectively only. *In re F.D. Processing, Inc.*, 119 Wn. 2d 452, 460, 832 P.2d 1303 (1992). A legislative enactment is presumed to apply prospectively only, and will not be held to apply retrospectively unless such legislative intent is clearly expressed. *Amburn v. Daly*, 81 Wn.2d 241, 246, 501 P.2d 178 (1972); *Anderson v. Seattle*, 78 Wn.2d 201, 202, 471 P.2d 87 (1970). Under Washington law, a new legislative enactment is presumed to be an amendment, rather than a clarification of existing law. *Marine Power & Equip. Co. v. Human Rights Comm'n Hearing Tribunal*, 39 Wn. App. 609, 615, 694 P.2d 697 (1985). It has long been the rule in Washington that a statute will be construed as having prospective application unless it plainly indicates an intent that it operate retroactively. *Anderson v. City of Seattle*, 78 Wn.2d 201, 471 P.2d 87 (1970).

The legislature has provided that forest excise tax is measured by the stumpage value of timber and has further specified that stumpage value is to be determined by the Department of Revenue. RCW 84.33. The application of the rate tables and categories are periodically adjusted and expressly state the time period for which they are applicable. There is no authority for the assertion that the classifications are to be applied outside of the particular period of time in which they are in effect. The addition of the small log category to WAC 458-40-610 in 1995 creates an additional subdivision, yet there is nothing that provides any authority for retroactive application of the Small Log category to the timber at issue in this case. As set forth above, the standards of statutory interpretation apply to the interpretation of administrative rules and regulations. Under these principles, a clear intent that a change in law shall be applied retroactively is required to rebut the presumption of prospective application. With regard to the addition of the small log category there is no indication of any intent, which would support retroactive application.

The taxpayer also asserts a lack of familiarity with the forest excise tax contributed to the failure to scale the timber in question. The taxpayer asserts that the corporation had "no way of knowing" of the scaling requirements prior to receiving instructions and forms from the Department at the end of its first quarter of business activities. The Department recognizes the relative complexity of the tax laws and seeks to assist the citizens of this state in obtaining information and educating taxpayer about their obligations. Yet, the law clearly places the duty to become informed about tax liabilities on the taxpayer, be they an individual or a business. The taxpayer had an obligation to make inquiries regarding the potential Washington State tax ramifications of engaging in the business of harvesting timber. *See,* Chapter 82.32A RCW, Taxpayer's Rights and Responsibilities. Lack of knowledge is simply not a basis for waiving tax, penalty, or interest. The burden was, therefore, on the taxpayer to solicit pertinent information regarding the taxation of its business activities and its failure to do so does not provide a basis for adjustment of the tax.

The amount of the tax refund requested by the taxpayer in its petition was calculated based on the amounts the corporation received for the timber at issue. Essentially the remedy being requested by the taxpayer is that the corporation be taxed as a small harvester on the timber at issue. During the period of time at issue, the taxpayer did not file returns as a small harvester. For activities in 1993 (3,468 MBF) and 1994 (7,182 MBF) the volume of timber harvested by the taxpayer far exceeded the small harvester limitation applicable at that time, and furthermore, would have been too high to qualify as a small harvester under the expanded definition effective July 1, 1995. Thus, for 1993 and 1994, the taxpayer was clearly required to provide a sample scale to validate the volume of timber sold. The taxpayer elected not to do so.

The taxpayer's activities during 1995, however, were of a substantially smaller magnitude. During the first two quarters of 1995, the 500 MBF per quarter and no more than 1, 000 MBF annually definition of small harvester applied. The taxpayer harvested 353 MBF in the first quarter and 157 MBF in the second quarter of 1995. These figures exceed neither the 500 MBF per quarter limitation nor 1,000 MBF annually. The taxpayer has already filed an amended return for the third quarter of 1995 as a small harvester and received an appropriate credit and so

that quarter shall not be discussed. As the taxpayer qualified as a small harvester during the first two quarters of 1995, calculation of forest excise tax based on the value of the timber sold would also be appropriate for these periods. While the taxpayer has the right to file an amended return for these two quarters, in the interest of facilitating resolution of this issue we find that as to the first two quarters of 1995, the tax due for the timber in question should be recalculated as if the taxpayer had filed as a small harvester.

A portion of the relief requested by the taxpayer is for a refund of part of the interest assessed. As an administrative agency, the Department of Revenue has no discretionary authority to waive or cancel penalties or interest. The only authority to waive or cancel penalties or interest is found in RCW 82. 32.105(1), which in pertinent part provides:

> If the department of revenue finds that the payment by a taxpayer of a tax less than that properly due or the failure of a taxpayer to pay any tax by the due date was the result of circumstances beyond the control of the taxpayer, the department of revenue shall waive or cancel any interest or penalties imposed under this chapter with respect to such tax.

WAC 458-20-228(7) (Rule 228), addresses the two specific circumstances where a cancellation interest will be considered by the Department. They are where the failure to pay was the direct result of written instruction given to the taxpayer by the department or where the extension of the due date for payment of the assessment was not at the request of the taxpayer and was for the sole convenience of the department. There is no information available that would support a wavier of statutorily imposed interest in this case beyond the appropriate adjustment or abatement of interest for any portions of the tax that may be refunded after recalculation of tax due consistent with this opinion.

DECISION AND DISPOSITION:

The taxpayer's petition is denied in part and granted in part. As to the first two quarters of 1995, we find the taxpayer was entitled to the classification of small harvester and that forest excise tax due on the timber in question harvested during those quarters should be assessed on that basis. For all other periods, the taxpayer did not qualify as a small harvester and the tax was properly assessed and is affirmed. This file will be remanded to the Forest Tax Section for adjustment.

Dated this 10th day of June 1999.