

Cite as Det. No. 07-0221, 27 WTD 6 (2008)

BEFORE THE APPEALS 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. 07-0221
... )	
)	Registration No. . . .
)	Document No. . . . /Audit No. . . .
)	Docket No. . . .
)	

- [1] RULE 268; RCW 82.63.045: SALES TAX DEFERRAL – ANNUAL SURVEY – DELINQUENT FILING – EXTENSION OF DUE DATE. The legislature has conferred to the Department no authority to extend the due date for filing an annual survey required by the high technology retail sales and use tax deferral program under Chapter 82.63. RCW.
- [2] RULE 268; RCW 82.63.045: SALES TAX DEFERRAL – ANNUAL SURVEY – REPAYMENT ASSESSMENT – COMPUTATION – CONSUMED EQUIPMENT. If a tax deferral recipient fails to timely file a survey, a repayment assessment is issued on 12.5% of the total taxes deferred under the certificate, including those imposed on property already consumed.
- [3] RULE 268; RCW 82.63.045, RCW 82.32.090: SALES TAX DEFERRAL – ANNUAL SURVEY – REPAYMENT ASSESSMENT – ASSESSMENT PENALTY. If a tax deferral recipient fails to timely file a survey, a repayment assessment is issued on 12.5% of the total taxes deferred under the certificate plus interest. However, the assessment penalty does not apply.

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.

Okimoto, A.L.J. – A sales tax deferral recipient protests a tax assessment resulting from its failure to timely file an annual survey on the basis that the late filing resulted from circumstances beyond the taxpayer's control, that the assessment was incorrectly computed, and that penalties

were incorrectly imposed. We deny the recipient's appeal of the repayment assessment and of the method used to compute the assessment, but cancel the five percent assessment penalty.<sup>1</sup>

### ISSUES

- 1) Does the Department have the statutory authority to waive or retroactively extend the date for filing an annual survey required under RCW 82.63.020?
- 2) If a tax deferral recipient fails to timely file a survey by the due date and a repayment assessment is issued under RCW 82.63.045, should the assessment be computed on equipment purchases that have been entirely consumed during the investment project?
- 3) Was the 5% assessment penalty properly imposed on a tax deferral assessment under RCW 82.63.045?

### FINDINGS OF FACT

[Taxpayer] is a biopharmaceutical company developing . . . products that manage human disease. Its primary place of business is in . . . Washington.

In 1995, Taxpayer applied for and received a High Technology Tax Deferral . . . under Chapter 82.63 RCW, for an expansion and renovation of its offices . . . . The project was declared operationally complete in 2001, and a deferred tax assessment . . . was issued for qualified deferred sales taxes of \$. . . . The deferred tax assessment covered equipment first used in this state during the period January 1, 1997 through December 31, 2001. Most of the equipment upon which the sales taxes were deferred consisted of assets of a short useful life ranging from three to five years, such as computers and related software. Many of these assets had been completely used up and disposed of by the time the repayment tax assessment was issued in 2006.

On March 30, 2005, Taxpayer's Treasurer completed and filed Taxpayer's High Technology Credit and High Technology Deferral Annual Survey (Annual Survey) for the year 2004. Taxpayer took the High Technology Credit on its April/05 and May/05 excise tax returns.

In July of 2005, Taxpayer was acquired by [a] company with its primary place of business outside the state. During the time period relevant to this appeal, Taxpayer either operated as a stand-alone entity or as a subsidiary of [the purchasing company]. Not long after the takeover, two of Taxpayer's key personnel . . . in Taxpayer's accounting department left the company. Consequently, Taxpayer hired an outside accounting firm to fulfill its Washington tax reporting responsibilities. In February of 2006, pursuant to instructions obtained from Taxpayer's tax consultant, the Department changed the reporting address on the Department's computer reporting system to the address of the accounting firm. From then on, all Washington excise tax

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

returns and other reporting information were sent to the accounting firm and not to Taxpayer's business offices.

In February of 2006, the Special Programs Division (Special Programs) of the Department sent Taxpayer a notice asking Taxpayer to complete the required 2005 Annual Survey. The notice listed a March 31, 2006 deadline for filing the survey and informed Taxpayer that "If a deferral recipient fails to file a survey by March 31, 2006, the Department must, pursuant to law, declare 12.5% of the total deferred taxes to be immediately due and payable." Taxpayer states that the notice went to the address of its tax accountant and that it had no knowledge of the notice.

The March 31, 2006 deadline for filing Taxpayer's 2005 Annual Survey passed without Taxpayer filing the required survey. As a result, Special Programs contacted Taxpayer on May 22, 2006 and informed Taxpayer that it would not be able to take the High Technology Credit for 2006, because it had failed to file the required 2005 Annual Survey. Special Programs also issued a repayment assessment of 12.5% of the original tax deferral pursuant to RCW 82.63.045(2)(b). This resulted in [an assessment] being issued for additional use taxes owing of \$. . . , interest of \$. . . and a five percent assessment penalty of \$. . . for a total owing of \$. . . Taxpayer appealed, and it remains due.

On July 10, 2006, Taxpayer contacted the Department and had its mailing address changed.

### ANALYSIS

Chapter 82.63 RCW establishes a retail sales and use tax deferral/waiver program to promote high technology research and development and pilot scale manufacturing facilities in the state. RCW 82.63.020 authorizes applications for deferral under the chapter. RCW 82.63.030 directs the Department to issue a deferral certificate for sales and use taxes otherwise due on each "eligible investment project."

Beginning in 2004,<sup>2</sup> each recipient of a tax deferral granted under Chapter 82.63 RCW was required to complete and file with the Department an annual survey explaining the activities that qualified it for a tax deferral during the previous calendar year. RCW 82.63.020. The survey for calendar year 2005 was due on March 31, 2006. The repayment guidelines for a tax deferral received under Chapter 82.63 RCW is contained in RCW 82.63.045. The statutory language covering a failure to file an annual survey provides:

(b) If a recipient of the deferral fails to complete the annual survey required under RCW 82.63.020 by the date due, 12.5 percent of the deferred tax shall be immediately due.

Because Taxpayer failed to timely complete and file the survey, RCW 82.63.045(2)(b) dictated that 12.5 percent of the deferred taxes "shall" become immediately due. By use of the word

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<sup>2</sup> Prior to that time, recipients received a letter which they returned with a statement describing their qualifying activities during the year.

“shall,” in RCW 82.63.045(2)(b) the legislature has made this consequence of failing to timely file a survey, mandatory. *See* Det. No. 88-168, 5 WTD 253 (1988).

Although Taxpayer acknowledges that it did not timely file an annual survey for 2005, it nevertheless argues that it should be relieved from the filing requirement because its failure to file the survey was due to circumstances beyond the taxpayer’s control. Taxpayer argues that the cumulative effect of a take-over by a new owner, the resulting loss of two key accounting personnel, and an unauthorized change of Taxpayer’s mailing address by its tax consultant constituted circumstances beyond [its] control and caused Taxpayer’s failure to file the required annual survey by its due date. Taxpayer relies on WAC 458-20-228 (Rule 228) and a publication issued by the Department entitled, *High Technology Business Tax Incentives*, January of 2006, in support of its position. That publication states:

By law, the Department of Revenue may extend the due date for Annual Surveys filed after December 31, 2004 when the failure of the taxpayer to file the survey by the March 31 due date was the result of circumstances beyond the control of the taxpayer. The Department will use the criteria in making this determination that are outlined in WAC 458-20-228.

Taxpayer’s reliance on the January 2006 publication and Rule 228 is misplaced. The reference in the January 2006 publication applies only to the High Technology Tax Credit granted under RCW 82.04.4452 or other credit or deferral programs where the Department has been specifically conferred the authority to waive or extend the due date for filing the required annual survey.<sup>3</sup>

Although RCW 82.04.4452(6)(b) and RCW 82.32.590 contain such a conferral of authority to extend the due date for filing the annual survey, there is no similar provision in Chapter 82.63 RCW for the high technology retail sales and use tax deferral program. RCW 82.63.060 does incorporate the administration provisions of Ch. 82.32 RCW, but those provisions do not provide for a waiver of the statutory requirement to file an annual survey. . . .

However, even if we were to assume that the Department did have the authority to waive or extend the due date for filing the 2005 annual survey for Taxpayer’s sales and use tax deferral under RCW 82.63.030, we note that late filings caused by a turnover in accounting personnel, an error by an outside accountant, or a failure to receive a Departmental notice are generally not considered circumstances beyond the taxpayer’s control. *See* Rule 228(9)(a)(ii)(D), 9(a)(iii)(C), 9(a)(iii)(E). Therefore, Taxpayer’s petition is denied on this issue.

Next, Taxpayer states that most of the assets upon which the tax deferral had been used were assets with a short useful life ranging from three to five years. Taxpayer states that by the time the repayment assessment was issued in 2006, most of the equipment purchased had been entirely consumed and/or disposed of during the qualifying investment project. Taxpayer argues

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<sup>3</sup> RCW 82.04.4452(6)(b) specifically confers to the Department the authority to extend the due date for filing the annual survey required for the High Technology Credit.

that these items had been exclusively used for their entire useful life in a qualifying manner and that their eligibility for the tax deferral had already been perfected. Therefore, Taxpayer argues that it should receive the full benefit of the sales tax deferral with respect to this equipment, notwithstanding the fact that it failed to file a survey for one year.

We disagree. As mentioned above, the 2004 Washington State Legislature added to the existing sales and use tax deferral program under Chapter 82.63 RCW a new annual survey requirement. The legislature recognized that “accountability and effectiveness” were important aspects of setting tax policy, and that in order to make policy choices regarding the best use of limited state resources, the legislature needed information on how a tax incentive was used. Consequently, the legislature mandated that all “applicants for deferral of taxes under this chapter shall agree to complete an annual survey.” RCW 82.63.020. Recipients are required to complete a survey by March 31<sup>st</sup> of the year following the calendar year in which the investment project is certified as operationally complete and during each of the seven succeeding calendar years. RCW 82.63.020(2)(a). RCW 82.63.045(2)(b) provides: “If a recipient of the deferral fails to complete the annual survey required under RCW 82.63.020 by the date due, 12.5 percent of the deferred tax shall be immediately due.” Contrary to Taxpayer’s assertion, we conclude that “deferred tax” means the total of all taxes deferred under the certificate, including those imposed on property entirely consumed. *See* WAC 458-20-268 (Rule 268). We find no merit in Taxpayer’s argument that only investment project purchases still being used at the time the survey was due should be included in the deferred tax base upon which the assessment is computed. Therefore, we deny Taxpayer’s petition on this issue.

Finally, Taxpayer argues that Special Programs erred by imposing a five percent penalty on the repayment assessment. RCW 82.63.045(3) provides that if deferred sales or use taxes are assessed as a result of noncompliance with the deferral provisions, “[t]he department shall assess interest at the rate provided for delinquent taxes, **but not penalties . . .**” (Emphasis added). In the present case, Special Programs added the 5% assessment penalty to the assessment. Because the statute specifically states that penalties are not to be included in a tax deferral repayment assessment, we grant Taxpayer’s petition on this issue. Rule 268(11).

#### DECISION AND DISPOSITION

Taxpayer’s appeal on its failure to timely file a survey and the computation of the tax assessment is denied.

Taxpayer’s appeal of the five percent assessment penalty is granted.

Dated this 21st day of August 2007.