

Cite as Det No. 08-0206, 28 WTD 84 (2009)

BEFORE THE APPEALS DIVISION  
DEPARTMENT OF REVENUE  
STATE OF WASHINGTON

In the Matter of the Petition For	)	<u>D E T E R M I N A T I O N</u>
Correction of Assessment of	)	
	)	No. 08-0206
...	)	
	)	
	)	Registration No. . . .
	)	Document No. . . ./Audit No. . . .
	)	Docket No. . . .

- [1] RULE 24001: RURAL COUNTY DEFERRAL – OWNER/LESSOR – ELIGIBILITY FOR DEFERRAL. Under 82.60.020(4)(b), the owner of a building that merely leases the building to a qualifying manufacturer is not eligible for the rural county deferral because it is not a manufacturer, but may receive the deferral if it agrees in a written contract to pass the economic benefit of the deferral to the lessee and the lessee agrees to complete the annual surveys.
- [2] RULE 24001: RURAL COUNTY DEFERRAL – LESSEE – ANNUAL SURVEY -- FILING. Under RCW 82.60.070(1)(b), a lessee who has received the economic benefits of a deferral is required to file the required annual survey.
- [3] RULE 24001: RURAL COUNTY DEFERRAL -- LESSEE – ANNUAL SURVEY – FAILURE TO FILE – LIABILITY FOR TAX. If the lessee fails to timely file the annual survey, the lessee – not the lessor – is liable for the assessment of 12½ percent of the originally deferred tax.
- [4] RULE 24001: RURAL COUNTY DEFERRAL – OWNER/LESSOR – ANNUAL SURVEY – TIMELY FILING – FAILURE – WAIVERS. By using the word “shall,” and by not providing for any waivers – even for good cause -- the legislature has enacted a mandate that the surveys be filed timely.

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.

Bauer, A.L.J. – A manufacturer protests the assessment of sales/use tax originally deferred under the rural county deferral program on the construction costs of the building it leased

because it did not file the required 2006 Annual Tax Incentive Survey or Report by the March 31, 2007 deadline. The assessment is upheld.<sup>1</sup>

### ISSUE

Was a manufacturer/lessee properly assessed 12.5% of the retail sales/use tax deferred under the Rural County Deferral Program on its lessor's building when the required 2006 Annual Tax Incentive Survey or Report was not submitted timely in accordance with RCW 82.60.070?

### FINDINGS OF FACT

The Special Programs Division of the Department of Revenue (Department) audited [Taxpayer] for the period September 1, 2002, through May 31, 2003, and issued the above-referenced assessment on July 25, 2007, for \$. . . , which equaled 12.5% of the combined total . . . of retail sales/use taxes deferred under chapter 82.60 RCW ("Tax Deferrals for Investment Projects in Rural Counties"<sup>2</sup>). On September 3, 2002, [a related LLC] and Taxpayer submitted duplicate applications for a Rural County deferral for the same building. The two entities were commonly owned. [The related LLC] was to build the building, and Taxpayer was to lease the building for its manufacturing activity. Special Programs Division (Special Programs) of the Department of Revenue (Department) approved [the related LLC's] application, and issued Deferral Certificate No. . . . [The related LLC] indicated on its application that Taxpayer and [the related LLC] were 100% commonly owned, and that Taxpayer would be leasing the building from [the related LLC].<sup>3</sup>

On June 3, 2005, [the related LLC] submitted another deferral application for the expansion of the same building, which expansion was also to be occupied by Taxpayer for its manufacturing activity. This application was approved under Deferral Certificate No. . . . on June 9, 2005.

Construction on each project, respectively, was completed and their costs audited on May 29, 2003 [(first deferral certificate issued)] and on April 4, 2006 [(second deferral certificate issued)] in order to establish the correct deferred amounts. The resulting assessments, whose payments would be deferred,<sup>4</sup> were issued to [the related LLC], with Taxpayer identified as the lessee.

Under the deferral program, participating taxpayers are required to file annual surveys. The survey for 2006 was due on March 31, 2007. Department records indicate that Special Programs mailed written reminders of the upcoming March 31, 2007, deadline for completing the 2006 survey to both Taxpayer and [the related LLC]. The notices directed the reader to the Department's website for the completion of the on-line survey, and advised how surveys could be filed by paper if electronic filing was not an option. The notice also advised how to ask Special Programs for an extension before March 31.

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

<sup>2</sup> Formerly Tax Deferrals for Investment Projects in Distressed Areas.

<sup>3</sup> Taxpayer withdrew its application when Special Programs approved Roston's request.

<sup>4</sup> The selection of audit period was in error, as the deferred assessment on the second certificate was not issued until June 9, 2005, and the audit period should have included this date. This error was only administrative in nature and does not affect the outcome of this case.

Department records indicate that the first notification was sent on February 11, 2007 to both entities at their respective registered addresses . . . .

Similar notices to both entities were again mailed on March 14, 2007. In addition, Special Programs telephoned both entities on March 27, 2007, to remind them the survey needed to be completed by March 31, 2007. . . . Taxpayer's Controller was actually contacted at Taxpayer's number on March 27, 2007, and a message was left on [the related LLC's] answering machine. Neither entity filed the survey nor did either request an extension to file the survey. As a result of their failure to file the survey on or before March 31, 2007, the Department issued an assessment for a 12.5% payment of the deferred taxes.

Taxpayer's representative -- who is both Taxpayer's President/Owner and [the related LLC's] Managing Member -- believes Special Programs notices concerning the upcoming due date for the annual survey were mailed only to Taxpayer, and not to [the related LLC], the entity that was given the deferral.

Conceding that some notices were received, however, Taxpayer asserts that the Controller was brand new at the time, and the survey did not get the attention it deserved because it did not have a Department of Revenue logo or a Washington State seal on it and did not look very "official." Taxpayer complains that it frequently receives surveys in the mail. Taxpayer further asserts that its new Controller confused the survey with the B&O tax credit for new hires, and did not complete the survey because Taxpayer was not doing any "new hires." Taxpayer recognized its mistake when the assessment was received and filed the survey along with its Petition for Correction of Assessment dated July 30, 2007. . . .

### ANALYSIS

[1] As a condition of the rural county deferral, RCW 82.60.070(1)(b)<sup>5</sup> requires an annual March 31 filing for eight years following the calendar year in which the Department certifies an investment project to be operationally complete. Annual surveys are therefore required for the deferrals here at issue until March 2011 [(first deferral certificate issued)] and March 2014 [(second deferral certificate issued)]. Taxpayer did not file the required 2006 annual survey by March 31, 2007.

Taxpayer notes that it was merely the lessee, and not the owner of the building that was granted the deferral certificate. . . .

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<sup>5</sup> . RCW 82.60.070(1)(b) provides:

Each recipient of a deferral granted under this chapter after June 30, 1994, shall complete an annual survey." . . . The survey is due by March 31st of the year following the calendar year in which the investment project is certified by the department as having been operationally complete and the seven succeeding calendar years. The survey shall include the amount of tax deferred, the number of new products or research projects by general classification, and the number of trademarks, patents, and copyrights associated with activities at the investment project. The survey shall also include the following information for employment positions in Washington: . . .

RCW 82.60.020(4)(b) provides:

The lessor or owner of a qualified building is not eligible for a deferral unless:

(i) The underlying ownership of the buildings, machinery, and equipment vests exclusively in the same person; or

(ii)(A) The lessor by written contract agrees to pass the economic benefit of the deferral to the lessee;

(B) The lessee that receives the economic benefit of the deferral agrees in writing with the department to complete the annual survey required under RCW 82.60.070; and

(C) The economic benefit of the deferral passed to the lessee is no less than the amount of tax deferred by the lessor and is evidenced by written documentation of any type of payment, credit, or other financial arrangement between the lessor or owner of the qualified building and the lessee.

The owner of a building that merely leases the building to another person is not eligible for the deferral because it is not a manufacturer. Such a lessor, however, may qualify for deferral if the economic benefit of the deferral is passed to a lessee that will use the building for a qualifying manufacturing use. For this to happen, the lessor must pass the economic benefit of the deferral to the lessee. . . .

[2] RCW 82.60.070(1)(b) provides:

Each recipient of a deferral granted under this chapter after June 30, 1994, shall complete an annual survey. If the economic benefits of the deferral are passed to a lessee as provided in RCW 82.60.020(4), the lessee shall agree to complete the annual survey and the applicant is not required to complete the annual survey.

(Emphasis added.) Thus, a lessee who has received the economic benefits of a deferral is required to file the required annual survey. This makes sense because the lessee – as the manufacturer – has the necessary data to complete it.

[3] [4] If the required survey is not completed, RCW 82.60.070(2)(b) further provides:

If a recipient of the deferral fails to complete the annual survey required under subsection (1) of this section by the date due, twelve and one-half percent of the deferred tax shall be immediately due. If the economic benefits of the deferral are passed to a lessee as provided in RCW 82.60.020(4), the lessee shall be responsible for payment to the extent the lessee has received the economic benefit.

(Emphasis added.) Thus, if the lessee fails to timely file the annual survey, the lessee . . . is liable for the assessment of 12½ percent of the originally deferred tax. By using the word

“shall,” and by not providing for any waivers – even for good cause -- the legislature has enacted a mandate that the surveys be filed timely.<sup>6</sup>

As to Taxpayer’s complaint that the reminder notices mailed by Special Programs did not look official enough, we note that there is no requirement in the law or the rule requiring the Department to issue any reminders at all. As to Taxpayer’s complaint that the notice was mailed to Taxpayer, and not to the building owner [the related LLC], Department records indicate that both entities were notified.

Taxpayer, as the lessee/manufacturer, was the entity responsible for filing the survey and paying the tax if the survey was not timely filed. The survey was not timely filed. Therefore, we hold that 12½ percent of the deferred amount . . . was properly due on March 31, 2007. . . .

#### DECISION AND DISPOSITION

The petition for correction of assessment is granted in part and denied in part. This matter is remanded to the Special Programs Division for cancellation of the penalty and the recomputation of interest.

Dated this 1st day of August 2008.

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<sup>6</sup> Prior to 2004, RCW 82.60.070 (2)(b) provided some discretion in the assessment of the deferred tax:

If the recipient fails to submit a report or submits an inadequate report, the department may declare the amount of deferred taxes outstanding to be immediately assessed and payable.