Cite as 3 WTD 435 (1987)

BEFORE THE INTERPRETATION AND APPEALS SECTION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

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| In the Matter of the Petition for Refund of | ) | D E T E R M I N A T I O N |
| | ) | No. 87-256 |
| . . . | ) | Registration No. . . . |
| | ) | Tax Assessment No. . . . |

[1] **RCW 82.32.060 and WAC 458-20-229:** RETAIL SALES TAX - CREDIT - REFUND - NONCLAIM PERIOD - PAYMENT OF ASSESSMENT WITHIN FOUR YEARS. The language of RCW 82.32.060 does not mandate a netting of all individual excise taxes coming under the purview of Title 82 RCW before determining the amount of any overpayment which may have been made within the nonclaim period. The use of the article "a" modifying "tax" mandates that taxes which have been "overpaid" be calculated on a "tax by tax" basis, without regard to any erroneous overpayments of other individual taxes.

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.

TAXPAYER REPRESENTED BY: . . .

DATE OF HEARING: May 14, 1986

NATURE OF ACTION:

The taxpayer petitioned the Department for a refund of sales taxes erroneously paid over a six year period to another entity, by then defunct, for the rental of real estate. The Department allowed a credit for those taxes which had been erroneously paid during the four year nonclaim period, but denied credit for those taxes paid prior to that time.

FACTS:

Burroughs, A.L.J. -- The Department of Revenue examined the business records of the taxpayer ( . . . ) for the period January 1, 1981 to December 31, 1984. As a result of that audit, the

Department issued a final tax assessment on March 6, 1986, which made an adjustment within the audit period allowing a credit of $18,704, and interest of $2,309, for sales tax erroneously paid to a partnership for the rental of real property. The partnership's account had been closed on June 25, 1982. The partners in the partnership were also the major stockholders of the taxpayer, and accounting records for the two entities were available at the taxpayer's location.

From 1977 to June 24, 1982 the taxpayer paid sales tax to the partnership for the rental of equipment at its Longview facility. The taxpayer subsequently discovered that much of that equipment was real property, and on November 15, 1985 requested a refund of sales tax paid for that entire period. The Department allowed a credit by way of a supplemental audit adjustment to the 1985 assessment for sales taxes paid from 1981 to June 1982 in accordance with RCW 82.32.060. No refund or credit was made for taxes paid more than four years prior to the beginning of the calendar year in which the refund application is made or examination of records is completed in accordance with RCW 82.32.060 and WAC 458-20-229.

The taxpayer, in its petition dated January 20, 1986 outlined the facts of this case as follows:

> Retail Sales Tax was paid in error upon the lease by [taxpayer] of certain real property, specifically a sawmill and fixtures attached therein, from the related and now defunct partnership, . . . [The partnership], as lessor, collected the Retail Sales Tax measured by the lease transactions and records are available documenting all Retail Sales Tax as paid to the Department of Revenue. The lessor, however, has discontinued business and closed its tax registration account precluding direct recovery therefrom.
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> Two audit examinations have been completed upon . . . [the taxpayer] . . .since 1981. The first . . . assessed additional tax due in the amount of $100,326[1] (adjusted)

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[1] The assessment issued June 9, 1981 totalled $176,096 (including interest). A supplemental adjustment to the original audit generated an amended assessment dated December 10, 1981 which totalled $134,891 (including interest). A payment of $132,614 had been made October 29, 1981, and the balance was paid following the December assessment.

> covering the period July 1, 1976 through June 30, 1980.[2] That assessment was initially issued June 9, 1981 and was paid in full by the taxpayer October 29, 1981. The second and most recent audit examination of the period January 1, 1981 through December 31, 1984 is evidenced by Tax Assessment No. . . . .
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> [The taxpayer's Vice President] corresponded with the auditor . . . on November 15, 1985 asking that he correct both tax assessments. The auditor then confirmed the facts and granted a correction of Tax Assessment No. . . . (1981-1985) to the satisfaction of [the taxpayer], however, he denied the earlier Tax Assessment No. . . . (1976 - 1980). The Auditor remarked that the 1981 assessment was "beyond statute" thereby barring recovery or correction.

At the hearing the taxpayer's representative noted that although the 1981 and 1985 audits concentrated on leases, the Department did not recognize the mistaken overpayments of retail sales tax in this case, but instead picked up only the debits.

TAXPAYER'S EXCEPTIONS:

The taxpayer's representative presented the following arguments in its petition for refund:

> The Auditor takes the position that any correction applied to the 1981 assessment for the period 1976-1980 would be beyond statute, therefore, barring recovery. In addition, however, the Auditor observed that no Retail Sales Tax was assessed within the period 1976-1980 nor were these particular assets individually set forth in a specific schedule. Lacking any statement in writing from the Auditor, it will be these issues which are addressed in an appeal.
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> I make the distinction underlying the petition by [the taxpayer] that <u>it is the amount of tax due and paid in 1981 which is in excess and, therefore, not proper.</u> Whereas both the 1981 & 1985 audit examinations reviewed all lease transactions within their respective periods, they both erred by assuming that this property was personalty subject to Retail Sales or Use Tax. In both instances the resultant original assessments were overstated. In respect to the 1985 assessment, the Auditor corrected the overstatement by issuing a

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[2] The December 1981 assessment for the period July 1, 1976 through June 30, 1980 was facially correct in that it assessed taxes correctly due, none of which were retail sales tax.

supplemental audit adjustment, considered to be standard Department policy. This type of corrective action was performed exclusively as applied to the 1985 document (Tax Assessment No. ... of the period 1981-1984), and none other. Likewise, an errant 1981 document, whether discovered in 1981 or at any point subsequent, shall be the subject of correction or refund if timely petitioned in accordance with WAC 458-20-229. Within the rule it states:

> **Refunds.** If upon written application for a refund or an audit of his records, or upon examination of the returns or records of any taxpayer, it is determined by the department of revenue that within the four calendar years immediately preceding the receipt by the department of such an application, or within the four calendar years immediately preceding the completion by the department of such an examination, a tax has been paid in excess of that properly due, the excess amount paid within said period will be credited to the taxpayer's account or will be refunded to him. (additional emphasis mine)

In respect to Rule 229, I wish to summarize the standing of [the taxpayer]. First, the petition by [the taxpayer] has already been determined by the Interpretation & Appeals Section to have been "timely filed" and, therefore, it stands to reason that the claim, at least in respect to the four year statute of limitations, is indeed valid. (I refer your correspondence of December 20, 1985). Second, [the taxpayer's] timely petition requests a 'correction' of the assessment(s) to achieve the "proper" amount due and whereas the auditor has in fact already prepared one such "correction" to achieve that purpose, it remains that he perform that same type of "correction" upon the remaining assessment within statute. Lastly, the Auditor raised several other objections yet he has already contradicted these secondary arguments by the issuance of the recent adjustment. May it please be noted that the adjustment of the recent tax assessment is a correction to an original assessment which similarly does not contain Retail Sales Tax, has none of these items under separate schedule, nor are any other outside documents, Combined Excise Tax Returns for instance, of bearing thereto.

In conclusion, the petition seeking correction of Tax Assessment No. ... for Retail Sales Tax paid in error has been tendered within the period prescribed by administrative rule and statute, has precedence firsthand

> by the correction of [the 1985] Tax Assessment . . . , and is unaffected by other issues seemingly raised and contradicted by the Auditor. The claim for correction of the tax assessment by a taxpayer of confirmed standing remains valid and deserving of immediate attention.

ISSUE:

The sole issue for resolution is whether the nonclaim statute, RCW 82.32.060, bars a refund of sales taxes erroneously paid more than four years prior to the refund request.

DISCUSSION:

As an initial matter, long-standing Departmental policy regarding refunds or credits to buyers of retail sales taxes paid directly to sellers is to require those buyers to obtain refunds directly from their sellers, who will then receive corresponding credits from the Department. In this manner, the Department lessens the risk of refunding or crediting buyers with tax dollars that might not have been turned over by sellers to the State of Washington in the first place. This general policy of not granting refunds or credits directly to buyers, of course, has its exceptions, one of which is an instance in which the Department is satisfied that the retail sales tax dollars have indeed been paid by the buyer, and then correctly reported and remitted to the state by the seller.

We note in this case that, because the books and records of the seller (which was by then defunct) were available, the auditor was satisfied that sales taxes which had been collected had been properly remitted to the state. He thus issued a refund for the 1985 assessment period.

RCW 82.32.060 provides in pertinent part as follows:

> **Excess payment -- Credit or refund -- Payment of judgments for refund.** If, upon receipt of an application by a taxpayer for a refund or for an audit of his records, or upon an examination of the returns or records of any taxpayer, it is determined by the department that within the statutory period for assessment of taxes prescribed by RCW 82.32.050 a tax has been paid in excess of that properly due, the excess amount paid within such period shall be credited to the taxpayer's account or shall be refunded to the taxpayer at his option. <u>No refund or credit shall be made for taxes paid more than four years prior to the beginning of the calendar year in which the refund application is made or examination of records is completed.</u> (Emphasis provided.)

WAC 458-20-229 similarly provides in pertinent part as follows:

> If upon written application for a refund or an audit of his records, or upon examination of the returns or records of any taxpayer, it is determined by the department of revenue that within the four calendar years immediately preceding the receipt by the department of such an application, or within the four calendar years immediately preceding the completion by the department of such an examination, a tax has been paid in excess of that properly due, the excess amount paid within said period will be credited to the taxpayer's account or will be refunded to him.
>
> No refund or credit may be made for taxes paid more than four years prior to the beginning of the calendar year in which refund application is made or examination of records by the department is completed.

A careful reading of RCW 82.32.060 reveals that the statute specifically provides for a credit or refund only when "a tax has been paid in excess of that properly due." The article "a" suggests a singular tax. The reference to a singular tax would suggest that the Department should not evaluate all excise taxes and determine if there is anything properly due, but rather, whether there is a single tax upon which some additional amount is due. Therefore, we do not agree with the interpretation given by the taxpayer that "additional taxes" means "additional" in terms of all amounts actually paid, but only in respect to individual excise taxes.

Additionally, the legislature in 1963 amended RCW 82.32.060 to read, in pertinent part, as follows:

> No refund or credit shall be allowed with respect to any payments made to the commission more than two years before the date of such application or examination. Where a refund or credit may not be made because of the lapse of said two year period, the amount of the refund or credit which would otherwise be allowable for the portion of the statutory assessment period preceding the two year period may be offset against the amount of any tax deficiency which may be determined by the commission for such statutory assessment period. (Emphasis added.)

Thus, RCW 32.32.060 as it existed after 1963 specifically provided that overpayments made prior to the two year claim period, and thus unavailable to taxpayers as credits or refunds, could nonetheless be used to offset any tax deficiencies attributable to periods prior to that claim period. In short, that version of the nonclaim statute particularly granted the very relief which the taxpayer now requests.

The "offset" language of that code section survived further legislative amendments in 1965 and 1971. In 1979, however, the claim period was extended to four years in order to more closely parallel the four year statute of limitations for assessment found in RCW 82.32.050. That amendment (in pertinent part and in bill draft form) read as follows:

> If, upon receipt of an application by a taxpayer for a refund or for an audit of his records, or upon an examination of the returns or records of any taxpayer, it is determined by the department that within the ((~~two years immediately preceding the receipt by the department of the application by the taxpayer for a refund or for an audit, or, in the absence of such an application , within the two years immediately preceding the commencement by the department of such examination,~~)) statutory period for assessment of taxes prescribed by RCW 82.32.050 a tax has been paid in excess of that properly due, the excess amount paid within such period ((~~of two years~~)) shall be credited to the taxpayer's account or shall be refunded to the taxpayer, at his option. ((~~Except as to the utilization by the taxpayer of the credits in computing tax authorized by RCW 82.04.435, application for which credits must be made within two years of payment of the taxes giving rise to such credits, no refund or credit shall be allowed with respect to any payment made to the department more than two years before the date of such application or examination. Where a refund or credit may not be made because of the lapse of said two year period, the amount of refund or credit which would otherwise be allowable for the portion of the statutory assessment period preceding the two year period may be offset against the amount of any tax deficiency which may be determined by the department for such statutory assessment period.~~)) No refund or credit shall be made for taxes paid more than four years prior to the beginning of the calendar year in which the refund application is made or examination of records is completed. ...

Thus, by legislative enactment, the Department's authority to offset deficiencies attributable to time frames prior to the claim period with over payments made during that time was eliminated. Instead, it was specifically mandated that "[n]o refund or credit shall be made for taxes paid more than four years prior to the beginning of the calendar year in which the refund application is made or examination of records is completed."

The language of RCW 82.32.060 - "a tax has been paid in excess of that properly due" - does not mandate a netting of all individual excise taxes coming under the purview of Title 82 RCW before determining the amount of any overpayment which may have been made

within the nonclaim period. The use of the article "a" modifying "tax" mandates that taxes which have been "overpaid" be calculated on a "tax by tax" basis, without regard to any erroneous overpayments of other individual taxes. Because there was no sales tax included in the 1981 assessment covering the years 1976 through 1980, there was no resulting overpayment of that tax upon which a timely claim could have been made on November 15, 1985.

The taxpayer has noted that the tax assessment covering the period January 1, 1981 through December 31, 1984 was adjusted by the auditor pursuant to the taxpayer's written request of November 15, 1985. It is thus argued that this adjustment is supportive of its position that refunds are not and should not be considered on a tax by tax basis, since that assessment also contained no sales tax. The nonclaim period under RCW 82.32.060 for a request for refund is "four years prior to the beginning of the calendar year in which the refund application is made or examination of records is complete." The taxpayer's application for refund was dated November 15, 1985, the initial examination of records having been completed March 29, 1985. The nonclaim period in this case thus extended back to January 1, 1981. The November refund request triggered a supplemental audit which was completed December 23, 1985. The resulting credit was based on and equalled those sales taxes actually overpaid during the years 1981 and 1982; the credit was neither based on or related to the assessment (the claimed "overpayment") which had been issued. Thus, the credit was properly granted.

The fact that the credit was granted by means of an adjustment of the 1985 tax assessment was reflective only of Departmental audit practice to net all taxes underpaid and overpaid during a normal four year assessment period. This practice normally saves both the Department and the taxpayer the time and effort it would take to process an assessment calculated without the credit adjustment, and then process a separate refund claim. In this instance, the Department could have chosen to enforce the original assessment and issued a credit or refund as a separate action. The fact that it chose to consolidate the actions does not alter their underlying nature.

The taxpayer has lastly contended that this Division's acceptance of this appeal as "timely filed" supports the validity of the taxpayer's position. We must disagree. WAC 458-20-100 provides in pertinent part as follows:

> (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. ...

> (3) Under the law the petition must be received by the department of revenue 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. An extension of thirty days in the due date of the assessment may be granted if additional time is required for preparation of the appeal and such extension is requested prior to expiration of the twenty day period. If no petition is filed within these time periods, the assessment covered by the notice shall become final. (Emphasis provided.)

The taxpayer's petition, received by the Department on January 21, 1986, is a petition for a correction of the assessment which was issued on March 6, 1986[3]. Because the petition for correction was received by the Department within twenty days after the assessment was issued, the appeal was timely filed and properly accepted for review. The Department's acceptance of the petition had no bearing on the underlying issue of whether the nonclaim period for a credit of overpaid tax had passed.

Accordingly, the taxpayer's petition must fail.

DECISION AND DISPOSITION:

The taxpayer's petition for refund is denied.

DATED this 29th day of July 1987.

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[3] The auditor and the taxpayer's representative had discussed the assessment before its issuance on January 16.