

Cite as Det. No. 16-0074, 35 WTD 545 (2016)

BEFORE THE APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

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| 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. 16-0074 |
| |) | |
| ... |) | Registration No. . . . |
| |) | |

[1] RCW 82.60.049; RCW 82.60.080: RETAIL SALES TAX DEFERRAL – COMMUNITY EMPOWERMENT ZONE – EMPLOYEE REQUIREMENT: To qualify for the deferral in RCW 82.60.049, a taxpayer must hire “at least one qualified employment position for each seven hundred fifty thousand dollars of investment for which a deferral is requested.” RCW 82.60.049(2)(a). The taxpayer could not meet this requirement by using independent contractors rather than hiring employees.

[2] RCW 82.60.049; WAC 458-20-24001A: RETAIL SALES TAX DEFERRAL – COMMUNITY EMPOWERMENT ZONE – PRORATION NOT ALLOWED: A taxpayer is not allowed to prorate the amount of the deferral for which it hired qualified employees when it fails to hire the requisite amount of employees in the Community Empowerment Zone.

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.

M. Pree, A.L.J. – A manufacturer, who deferred paying retail sales tax in a community empowerment zone (CEZ), appeals the tax assessed after the Department of Revenue (Department) concluded that the manufacturer did not hire the requisite number of qualified employment positions based on the law in effect when the manufacturer applied for the deferral. In the alternative, the taxpayer asks to prorate the deferred tax for the qualified employment position it did hire. Because the manufacturer did not hire the requisite number of qualified employment positions, and there is no authority to prorate for the single qualified employment position, we deny the petition.¹

ISSUES

1. Under RCW 82.60.049, RCW 82.60.080 . . . must the manufacturer who obtains a tax deferral for employing individuals in a CEZ employ the workers or can they be employed by a contractor paid by the applicant?

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

2. Under RCW 82.60.049 and [WAC 458-20-24001A (Rule 24001A)], if the manufacturer does not hire the requisite number of qualified employment positions, may the manufacturer prorate the CEZ deferral based upon the qualified employment positions it did hire?

FINDINGS OF FACT

[Taxpayer] manufactures ... in Washington. The taxpayer applied for a CEZ tax deferral for sales and/or use tax on July 15, 2009. The Department's Special Programs Division (SPD) approved the taxpayer's application on July 22, 2009, and issued a CEZ certificate. The taxpayer anticipated building a new structure (facility) in a CEZ in Washington and hiring ten full time employees in the CEZ. SPD reviewed the taxpayer's project in 2012 and required the taxpayer to hire four qualified employment positions by the end of 2012, and keep them employed for twelve months. The taxpayer purchased equipment using the CEZ certificate, and did not pay retail sales tax and/or use tax on the equipment.

The taxpayer contacted the Department in 2013, and said that it had not hired four employees residing in CEZs. SPD issued Document No. . . . , which billed the taxpayer for the deferred tax of \$. . . on the \$. . . investment project. The taxpayer appealed.

SPD checked the residential addresses of the four employees and found that only one lived in the CEZ. The SPD notes that the Department specifically instructed the taxpayer that it must hire four residents from the CEZ for the project.² Both the application form and the SPD's 2009 approval letter specifically provided that if the taxpayer did not fill the qualified employment positions, "all deferred taxes are immediately due."

The taxpayer contends that it did hire four employees, one who lived in a CEZ, and three additional employees in the county containing a CEZ. The taxpayer argues that it met the spirit of the deferred sales tax program. In the alternative, the taxpayer contends that it should be entitled to a deferral of \$. . . for the one employee who lived in a CEZ that it did hire.

In addition, the taxpayer only employed one of the individuals by the end of 2012.³ The taxpayer was not the employer of record for the three employees who did not live in the CEZ. The taxpayer states that due to internal hiring issues, unrelated to tax, the taxpayer hired them as contractors, but the taxpayer had the right to control each individual. The taxpayer states that they were not independent contractors because each individual only worked for the taxpayer, the taxpayer controlled when, where, and how they worked, and the individuals did not maintain an office and were not liable for any expenses. The three individuals were paid by independent contractors who billed the taxpayer. One contractor billed the taxpayer for "consulting and financial services," and the other for "professional services." The billings appeared to be measured by hours worked.

² On August 21, 2012, SPD sent the taxpayer the Rural County CEZ Deferral Fact Sheet, which stated, "You must hire four (4) residents from the CEZ for this project."

³ According to the taxpayer, the three individuals are now employees of the taxpayer.

ANALYSIS

Under RCW 82.08.020, the state of Washington imposes retail sales tax on “each retail sale in this state.” RCW 82.04.050 defines the terms “retail sale” and “sale at retail” broadly to mean “every sale of tangible personal property (including articles produced, fabricated, or imprinted) to all persons irrespective of the nature of their business and including, among others, without limiting the scope hereof, persons who install, repair, clean, alter, improve, construct, or decorate real or personal property of or for consumers.” RCW 82.04.050(1)(a). The term also includes tangible personal property consumed and/or for labor and services rendered in respect to “the constructing, repairing, decorating, or improving of new or existing buildings or other structures under, upon, or above real property of or for consumers” RCW 82.04.050(2)(b)

Chapter 82.60 RCW establishes a retail sales and use tax deferral/waiver program to promote economic stimulation, create employment opportunities, and reduce poverty in rural or distressed areas of the state. *See* RCW 82.60.010. RCW 82.60.030 authorizes applications for deferral under the chapter. RCW 82.60.040 directs the Department to issue a deferral certificate to taxpayers for sales and use taxes otherwise due on each “eligible investment project” that is located in an “eligible area.” RCW 82.60.040. RCW 82.60.065 forgives repayment on deferred taxes for investment projects upon which deferral was granted after June 30, 1994.

Currently, RCW 82.60.049(2) provides the requirements (and limits for the deferral program under chapter 82.60 RCW:

In addition to the provisions of RCW 82.60.040, the department shall issue a sales and use tax deferral certificate for state and local sales and use taxes due under chapters 82.08, 82.12, and 82.14 RCW, on each eligible investment project that is located in an eligible area, if the applicant establishes that at the time the project is operationally complete:

- (a) The applicant will hire at least one qualified employment position for each seven hundred fifty thousand dollars of investment for which a deferral is requested; and
- (b) The positions will be filled by persons who at the time of hire are residents of the community empowerment zone. As used in this subsection, "resident" means the person makes his or her home in the community empowerment zone or the county in which the zone is located. A mailing address alone is insufficient to establish that a person is a resident for the purposes of this section. The persons must be hired after the date the application is filed with the department.

The taxpayer argues that it qualifies for the deferral because it employed four individuals who were residents of the CEZ. There is no dispute that the taxpayer hired one individual who resides in the CEZ. However, the other three individuals were not employed by the taxpayer.⁴ Rather, the taxpayer paid another business to use that business' employees. RCW

⁴ Because these three individuals were not the taxpayer's employees, we need not address whether there were residents of the CEZ in accordance with RCW 82.60.049(2).

892.60.049(2)(a) requires the applicant to, “hire at least one qualified employment position for each seven hundred fifty thousand dollars of investment for which a deferral is requested.” RCW 82.60.080 provides that the Employment Security Department will make, and certify to the Department, all determinations of employment and wages as requested by the Department under chapter 82.60 RCW. According to the Employment Security Department, only one employee was hired by the taxpayer. The Employment Security Department did not certify that the other three were hired by the taxpayer. Therefore, the taxpayer has only hired one of the four qualified employment positions it was obligated to hire under RCW 82.60.049.

Finally, because the taxpayer did hire one qualified employment position with an employee residing in the CEZ, the taxpayer contends that it should be allowed to defer sales tax on \$. . . of the \$. . . project. RCW 82.60.049(4) states, “If a person does not meet the requirements for qualified employment positions by the end of the second calendar year following the year in which the project is certified as operationally complete, all deferred taxes are immediately due.” The Department promulgated Rule 24001A to address applications submitted prior to July 1, 2010, which states in part:

(ii) Failure of investment project to satisfy required employment positions conditions. If, on the basis of the recipient's annual survey or other information, the department finds that an investment project has been operationally complete and has failed to create the required number of qualified employment positions under subsection (102)(i) of this section, the amount of taxes deferred will be immediately due. There is no proration of the amount owed under this subsection. No penalties or interest will be assessed on the deferred sales/use tax; however, all other penalties and interest applicable to excise tax assessments may be assessed and imposed.

Rule 24001A(108)(b)(ii) (emphasis supplied).

All deferred taxes are due. The taxpayer may not defer taxes on \$. . . for its one qualified employment position. Because the taxpayer failed to hire four qualified [employees] by the end of the year following the year in which the investment project was operationally complete, it may not prorate the tax owed.

DECISION AND DISPOSITION

We deny the taxpayer’s petition.

Dated this 19th day of February, 2016.