

Cite as Det. No. 18-0256, 39 WTD 166 (2020)

BEFORE THE ADMINISTRATIVE REVIEW AND HEARINGS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition for Review of)	<u>D E T E R M I N A T I O N</u>
Rescission of Sales and Use Tax Deferral)	
)	No. 18-0256
)	
...)	Registration No. ...
)	

RCW 82.60.020; RCW 82.60.030; WAC 458-20-24001 – TAX DEFERRAL – “QUALIFIED BUILDING” - NOT CONSTRUCTED. Because the taxpayer did not construct the qualified building upon which the deferral application’s approval was based, its eligibility for the deferral was not maintained. There is no provision in law or in Rule 24001 allowing an applicant to change the qualified building location because of unforeseeable circumstances.

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.

Callahan, T.R.O. – A limited liability company protests the Department’s rescission of the company’s High Unemployment County Sales and Use Tax Deferral certificate because the company did not construct the qualified building included in the approved application. Taxpayer argues that its failure to construct the qualified building should not be a basis for rescinding the deferral because its abandonment of construction of the qualified building was due to an unforeseeable condition. We deny the Taxpayer’s petition.¹

ISSUE

Under RCW 82.60.020, RCW 82.60.030 and WAC 458-20-24001, did the Department properly rescind the sales and use tax deferral for an investment project when the qualified building included in the deferral application was not constructed?

FINDINGS OF FACT

On June 23, 2016, the Department received . . . (“Taxpayer’s”) High Unemployment County Sales and Use Tax Deferral application (the “Application”) for an investment project that involved construction of a building that would be used for qualifying activities. On August 6, 2016, the Department’s Special Programs Division sent a letter to Taxpayer notifying Taxpayer its Application was approved to construct a building to be located at . . . Washington (the “Qualified

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

Building”), to be leased to . . . (the “Lessee”) to perform qualifying activities at the Qualified Building. The Lessee would manufacture industrial equipment and electronic control systems, and would utilize iterative designs and prototypes to create new products for the industries and customers the Lessee would serve. The letter also provided that the Department would verify that the Lessee would perform the qualified activities at the Qualified Building. The letter provided that if the construction on the Qualified Building was not complete by December 31, 2017, Taxpayer may request an extension prior to the deferral certificate’s expiration date.

The Department issued High Unemployment County Deferral Certificate Number . . . (“Certificate”), effective June 23, 2016, which expired on December 31, 2017. The Certificate was for the sales and use tax incurred for the construction of the Qualified Building.

On December 4, 2017, the Department’s Refund and Tax Deferral Unit sent a letter to Taxpayer inquiring about the status of the Qualified Building’s construction. The letter informed Taxpayer the Department would audit the construction of the Qualified Building once it was complete. Due to Taxpayer’s lack of response to the first letter, on January 9, 2018, the Refund and Tax Deferral Unit sent Taxpayer a duplicate second letter.

On January 26, 2018, Taxpayer responded to the Refund and Tax Deferral Unit’s second inquiry letter, requesting the Department to extend the Certificate’s expiration date because Taxpayer did not start to construct the Qualified Building [because of environmental issues at the planned location]. Taxpayer explained that after the Application was approved [for the original building location], it [secured a different location three miles from the original location but] was not able to construct the Qualified Building [at the new location] until January 19, 2018.

An examiner from the Special Programs Division contacted Taxpayer to further inquire about the reason for Taxpayer’s extension request. The examiner learned that Taxpayer would not construct the Qualified Building that would be located at . . . Washington because of the storm water retention issues at that location. The City of . . . storm water retention requirements would require Taxpayer to compromise the building’s footprint and available parking lot of the Qualified Building by setting aside a significant area of land for a storm water retention pond. As a result, Taxpayer had chosen a new location for the investment project.

On April 5, 2018, the Refund and Tax Deferral Unit issued a letter to Taxpayer explaining that the Application’s approval was rescinded and the Certificate was no longer valid because Taxpayer did not construct the Qualified Building [at the location] included in the project covered by the Certificate.

Taxpayer timely petitioned the Department’s Administrative Review and Hearings Division for review of the rescission of Taxpayer’s previously approved Application. Taxpayer argues that it intended to construct the Qualified Building at the time of its Application, but for the change of the City . . . storm water retention rules, which made the site (the “Site”) where the Qualified Building was intended to be constructed unfit for Taxpayer’s project. Taxpayer stated that the developer of the commercial lot where the Site is located created a master development site plan that was approved by the City . . . as part of a small industrial park. The Site was the last parcel to be developed among the master development site plan. Taxpayer explained that during the time

between the original approval of the master development site plan by the City . . . and the summer of 2016, the City . . . had updated the storm water retention rules. Under the new storm water retention rules, the planned storm water capacity on the Site was insufficient. The shortfall in storm water capacity would require Taxpayer to set aside a significant area of land to accommodate a new storm water retention pond. Taxpayer asserts that this requirement would make the Site unusable for Taxpayer's investment project because Taxpayer would have to compromise the Qualified Building's footprint and available parking areas to accommodate the construction of a new storm water retention pond. Taxpayer contends that approval of its Application should not have been rescinded because these unforeseen events prevented Taxpayer from beginning construction of the Qualified Building before expiration of the Certificate.

ANALYSIS

Washington has both a retail sales tax and a use tax. Retail sales tax is an excise tax imposed on each retail sale in this state. RCW 82.08.020; RCW 82.08.050. The use tax is imposed "for the privilege of using within this state as a consumer any article of tangible personal property acquired by the user in any manner" on which Washington's retail sales tax has not been paid. RCW 82.12.020(1).

Rural Sales and Use Tax Deferral Program Under RCW 82.60.010:

Chapter 82.60 RCW establishes a number of tax deferral programs, including a high unemployment county sales and use tax deferral program (High Unemployment County Deferral Program), for use in certain rural counties. The purpose of the programs is to encourage investors and landowners to build qualified investment projects to promote economic stimulation, increase employment, and reduce poverty in rural counties. RCW 82.60.010. The programs defer sales and use tax on materials, labor, and services provided in the construction of qualified buildings or the acquisition of qualified machinery and equipment. *See generally* RCW 82.60.010, *et seq.*; WAC 458-20-24001(1)(a).

Under these deferral programs, RCW 82.60.040 requires the Department, in response to taxpayer applications under RCW 82.60.030, to issue tax deferral certificates for state and local sales and use taxes on "eligible investment project[s]" located in "eligible area[s]." RCW 82.60.020(4). "Investment project means an investment in qualified buildings" RCW 82.60.020(6). The statute defines "qualified buildings" as "construction of new structures, and expansion or renovation of existing structures for the purpose of increasing floor space or production capacity used for manufacturing or research and development activities" RCW 82.60.020(9).

The deferral application must contain:

[I]nformation regarding the location of the investment project, the applicant's average employment in the state for the prior year, estimated or actual new employment related to the project, estimated or actual wages of employees related to the project, estimated or actual costs, time schedules for completion and operation, and other information required by the department

RCW 82.60.030(1) (emphasis added).

WAC 458-20-24001 (“Rule 24001”) is the administrative rule addressing the implementation of the High Unemployment County Deferral Program. Rule 24001(11) provides that applicants and recipients may make a written request to the Department’s Special Programs Division to amend an application when the original estimates change. The allowable amendments to the application include transfer of ownership of the project, or the project will take more time to complete than originally stated. Rule 24001(11)(a). However, “[a]n application may not be amended if the location of the qualified building changes.” Rule 24001(11)(b).

Here, there is no dispute that Taxpayer correctly followed the application procedures under Chapter 82.60 RCW, that its construction project qualified for the deferral, and that the project was to be located in an eligible area at the time of Application.² Rather, the dispute is whether eligibility for the deferral was maintained where the location of the investment project was changed after the Application’s approval.

The Application’s approval was based on the information regarding the location of the investment project Taxpayer provided as required under RCW 82.60.030(1). Taxpayer may not request to amend the Application by changing the location of the Qualified Building. Rule 24001(11)(b). Because Taxpayer did not construct the Qualified Building upon which the Application’s approval was based, its eligibility for the deferral was not maintained. RCW 82.60.030(1); Rule 24001(11)(b). Therefore, Special Program properly rescinded the Application’s approval and invalidated the Certificate.

Taxpayer asserts it abandoned the original construction plan on the Qualified Building because the originally planned storm water capacity was not sufficient under the City . . . new storm water retention rules, which was unforeseeable at the time of the Application. However, the statute is clear that a qualified investment project must be made in qualified buildings. RCW 82.60.020(6). The Department’s administrative rule further clarifies that applicants may not amend the applications by changing the location of the qualified building. Rule 24001(11)(b). When Taxpayer abandoned the original construction plan on the Qualified Building, despite the unforeseeable reason, the investment project provided on the Application is no longer an eligible investment project because it would not be made in a qualified building. RCW 82.60.020(4),(6); RCW 82.60.030(1); Rule 24001(11)(b). [There is no provision in law or in Rule 24001 allowing an applicant to change the qualified building location because of unforeseeable circumstances. Even if the Department were to treat Taxpayer’s change in location as an application for a new investment project, the new location is not in a county qualifying as an eligible area.³] Therefore, the Department properly rescinded Taxpayer’s deferral Certificate. Rule 24001(1)(a); *see* Det. No. 14-0416, 34 WTD 358 (2015).

² As of July 1, 2016, . . . County does not fall under the definition of “rural area” because it does not have a population density less than 100 persons per square mile, or smaller than two hundred twenty-five square miles. *Office of Financial Management*, <https://www.ofm.wa.gov/washington-data-research/population-demographics/population-estimates/population-density/population-density-and-land-area-criteria-used-rural-area-assistance-and-other-programs>. In response, the Department removed. . . County as an eligible area for the High Unemployment County Deferral Program. *Department of Revenue*, <https://dor.wa.gov/find-taxes-rates/tax-incentives/tax-incentive-program-resources>.

³ Both building locations are in . . . County which was an eligible area until June 30, 2016. *See* footnote 2, *supra*.

We deny Taxpayer's petition.

DECISION AND DISPOSITION

Taxpayer's petition is denied.

Dated this 21st day of September 2018.