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

In the Matter of the Petition for Refund)	<u>D E T E R M I N A T I O N</u>
)	
)	No. 20-0339
)	
...)	Registration No. . . .
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[1] WAC 458-20-229; RCW 82.32.060; B&O TAX; USE TAX: A refund of overpaid wholesaling B&O tax was properly offset by previously unassessed use tax liability. A refund credit may be reduced with a tax liability for a different tax category.

[2] WAC 458-20-229; RCW 82.32.050; RCW 82.32.060 B&O TAX; NONCLAIM STATUTE: The use of new information from the review of a refund claim to generate an offsetting liability is allowed under WAC 458-20-229, even where the nonclaim statute would preclude that offsetting liability being issued as a new assessment.

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.

Kreger, T.R.O. A distributor of grocery items asserts that its approved refund claim was improperly subject to offset amounts arising in a concurrent audit of the company’s Washington tax liability. The company asserts that any offsets should be limited to the type of tax at issue in the refund and by the nonclaim period that would apply to the assessment of the taxes used for the offset. We find that there is no basis to limit the offsets to the specific type of tax at issue in the refund request. As to the offset, because the provisions of WAC 458-20-229 specifically anticipate the review of new information to reduce a refund claim, we find the offset at issue was proper. The Taxpayer’s petition is denied.¹

ISSUES

1. Whether an offset to a refund request under RCW 82.32.060 is limited to the specific type of tax for which the refund was granted.

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

2. Whether an offset to a refund request reviewed in conjunction with an audit should be limited by the nonclaim period under RCW 82.32.050(4), which applies to the issuance of a new assessment.

FINDINGS OF FACT

. . . (Taxpayer) is a Washington corporation engaged in business as a grocery distributor. The Taxpayer is headquartered in . . . and maintains business locations in Washington and . . . [out-of-state]. The Taxpayer makes wholesale sales of grocery items including freshly prepared deli products.

The Department of Revenue (Department) selected the Taxpayer for an audit of its Washington business activities in 2016. The Department's Audit Division initially contacted the Taxpayer on May 17, 2016, providing notice that it would be reviewing the Taxpayer's Washington business activities for the period of January 1, 2012, through December 31, 2015. On June 10, 2016, the Taxpayer filed a refund request for \$. . . in tax it asserted had been overpaid between January 1, 2012, and December 31, 2015. Taxpayer's refund request was based on reclassifying sales that it had reported under the wholesaling business and occupation (B&O) tax classification to the slaughtering, breaking or processing of perishable meats B&O tax classification, which is subject to a lower tax rate. The Audit Division incorporated that refund request into the audit. Taxpayer subsequently amended its refund request to include 2016.

Between January 2017 and February 2018, there were communications between the Taxpayer and the Audit Division regarding documentation needed for the refund and the audit. The Taxpayer signed waiver agreements for 2012 and 2013, extending the nonclaim period for audit review for those periods through February 28, 2018.² Taxpayer also signed a waiver agreement for 2014, extending review of that year through May 31, 2019.

The refund request was granted in part and denied in part. On May 24, 2019 . . . , the Department approved a refund to the Taxpayer of \$. . . Use tax underpayments in 2012 and 2013 were netted against the requested refund, resulting in no refund or tax being due for 2012 and 2013. The refund issued is attributable to the amounts allowed for 2014, 2015, and 2016, plus applicable interest.

The Taxpayer subsequently filed a petition for review contesting the 2012 and 2013 reductions to the refund request. The Taxpayer does not substantively dispute calculation or liability for the use tax for 2012 and 2013 that was used for the offset, but rather asserts that the offset itself was improper. The Taxpayer notes that the nonclaim period waivers it had executed during the audit had expired prior to the partial refund being issued in 2019. Taxpayer asserts that because this tax could not have been assessed when the refund was issued in 2019, it should correspondingly not be used as an offset. Alternatively, the Taxpayer asserts that it is improper to offset a use tax assessment against a B&O tax refund. The Audit Division responds that the offset was timely in

² Previously, the Department's agreements to extend the nonclaim period under RCW 82.32.050(4) were referred to as statute of limitations waiver agreements. The Department has since amended its refunds rule, WAC 458-20-229(2)(a), to correct this terminology for the time limits for refunds to provide that RCW 82.32.060 "is a nonclaim statute rather than a statute of limitations." *See also, infra*, n. 3.

the context of reviewing the refund request and that review of tax due or refundable is not limited to a single type of tax.

ANALYSIS

Washington imposes B&O tax for “the privilege of engaging in business activities” in this state. RCW 82.04.220(1). The B&O tax is “extensive and is intended to impose . . . tax upon virtually all business activities carried on in the State.” *Analytical Methods, Inc. v. Dep’t of Revenue*, 84 Wn. App. 236, 241, 928 P.2d 1123 (1996) (quoting *Palmer v. Dep’t of Revenue*, 82 Wn. App. 367, 371, 917 P.2d 1120 (1996)). The B&O tax measure and rate are determined by the type or nature of the business activity in which a person is engaged. See Chapter 82.04 RCW. In this case, the Taxpayer had reported tax under the wholesaling rate provided by RCW 82.04.270 and subsequently discovered that a portion of its revenue was eligible to be taxed under the lower “slaughtering, breaking and/or processing perishable meat products” B&O tax rate provided by RCW 82.04.260(4). The scope of income subject to tax under the different B&O tax classification is not contested here. The issue is whether the review of the refund claim properly included offsets of additional use tax for 2012 and 2013.

The statute authorizing the filing of administrative refund claims, provides:

Any person, having paid any tax, original assessment, additional assessment, or corrected assessment of any tax, may apply to the department within the time limitation for refund provided in this chapter, by petition in writing for a correction of the amount paid, . . . in which petition he or she shall set forth the reasons . . . the tax, interest, or penalty, should be refunded.

RCW 82.32.170.

The time limitation referred to in RCW 82.32.170 is found in RCW 82.32.060, Washington’s tax refund statute, which provides in pertinent part:

If, upon receipt of an application by a taxpayer for a refund or for an audit of the taxpayer's 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, penalties, or interest prescribed by RCW 82.32.050 any amount of tax, penalty, or interest has been paid in excess of that properly due, the excess amount paid within, or attributable to, such period must be credited to the taxpayer's account or must be refunded to the taxpayer, at the taxpayer's option. Except as provided in subsection (2) of this section, no refund or credit may be made for taxes, penalties, or interest 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.

RCW 82.32.060(1).³

³ Washington’s refund statute is a nonclaim statute. *Guy F. Atkinson Co. v. State*, 66 Wn.2d 570, 572, 403 P.2d 880 (1965) (“Although both [parties] treat the problem posed by RCW 82.32.060 as one dealing with a statute of

The portion of RCW 82.32.050 addressing the statutory period for assessments, as referenced in RCW 82.32.060(1), above, provides in pertinent part:

No assessment or correction of an assessment for additional taxes, penalties, or interest due may be made by the department more than four years after the close of the tax year, except (a) against a taxpayer who has not registered as required by this chapter, (b) upon a showing of fraud or of misrepresentation of a material fact by the taxpayer, or (c) where a taxpayer has executed a written waiver of such limitation. The execution of a written waiver shall also extend the period for making a refund or credit as provided in RCW 82.32.060(2).

RCW 82.32.050(4).

In this case, the refund request covering 2012 and 2013 was filed in 2016, and was therefore timely. That refund request was reviewed in conjunction with an audit of the Taxpayer's Washington business activities that was also initiated in 2016. The point of dispute here is whether the reduction to that refund claim with additional . . . use tax liabilities for those years was proper. The Taxpayer asserts that it was improper to reduce the B&O tax credit with use tax liability. The Taxpayer asserts that the reductions to the refund claim are the functional equivalent of a new assessment, and so time limitations that would apply to issuing an assessment should also limit the reduction of the refund request.^[4] We disagree.

We begin with the question of whether a use tax liability may be used to reduce a B&O tax credit. WAC 458-20-229 (Rule 229) is the administrative regulation addressing refunds and applying refunds to other tax liabilities. The rule provides in part:

The department may apply overpayments against existing deficiencies and/or future assessments for the same legal entity. However, if preliminary schedules have not been issued regarding existing deficiencies or future assessments and the taxpayer is not presently under audit, the refund of an overpayment may not be delayed when the department determines a refund is due. The following examples illustrate the application of overpayments against existing deficiencies:

(a) The taxpayer's records are audited for the period Year 1 through Year 4. The audit disclosed underpayments in Year 2 and overpayments in Year 4. The department will

limitations, strictly speaking the question is one of nonclaim, rather than one of statute of limitations.”); *Paccar, Inc. v. Dep't of Revenue*, 85 Wn. App. 48, 51 n.3, 930 P.2d 954 (1997), *rev'd on other grounds*, 135 Wn.2d 310 (1998) (“[I]t is a nonclaim statute in that it does more than extinguish the ability to seek a remedy; it creates and destroys the underlying right to a refund or credit.”)

As a nonclaim statute, RCW 82.32.060 “designates the time allowed for the taking of a step which is a prerequisite to the bringing of an action.” *Guy F. Atkinson Co.*, 66 Wn.2d at 572. RCW 82.32.060 is procedural, and the limitation it imposes is addressed to the power of the Department to make a refund and the conditions under which it may be made. *Id.* Once a time limit in a nonclaim statute passes, the right to bring an action is “extinguished and cannot be revived by a subsequent statute enlarging the time limitation.” *Lane v. Dep't of Labor and Indus.*, 21 Wn.2d 420, 425, 151 P.2d 440 (1944). *See also* Black's Law Dictionary 1078 (8th ed. 2004) (defining “nonclaim” as follows: “A person's failure to pursue a right within the legal time limit, resulting in that person's being barred from asserting the right.”)

[⁴ Here, based on the waiver executed by the Taxpayer, the Department's time to issue an assessment for taxes owed in 2012 and 2013 expired on February 28, 2018.]

apply the overpayments in Year 4 to the deficiencies in Year 2. The resulting amount will indicate whether a refund or credit is owed the taxpayer or whether the taxpayer owes additional tax.

(b) The department has determined that the taxpayer has overpaid its real estate excise tax. The department believes that the taxpayer may owe additional B&O taxes, but this has yet to be established. The department will not delay the refund of the real estate excise tax while it schedules and performs an audit for the B&O taxes.

(c) The department simultaneously performed a timber tax audit and a B&O tax audit of a taxpayer. The audit disclosed underpayments of B&O tax and overpayments of timber tax. Separate assessments were issued on the same date, one showing additional taxes due and the other overpayments. The department may apply the overpayment against the tax deficiency assessment since both the underpayment and overpayment have been established.

Rule 229(9).

We note that the rule expressly addresses the application of a refund credit against liability for different tax categories. *See, e.g.*, Rule 229(9)(c) (stating that underpayments of B&O tax can be offset against overpayments of timber tax.). We find no authority that would support the limitation of an offset to refund to the same tax category. Indeed, the rule in the examples detailed above specifically uses liabilities from different tax categories to reduce the refund. *Accord* Det. No. 02-002, 22 WTD 131 (2003) (In computing the amount of tax properly due or refundable, neither the taxpayer, nor the Department, may limit the calculation to a single type of tax or credit.) We find no requirement that an underpayment of tax can only be offset against overpayments of the same tax classification and deny the Taxpayer's petition on this issue.

We next turn to whether the offset to the refund claim should be treated as an assessment of additional tax. Again we find the provisions of Rule 229 provide an example that specifically allows the offset at issue in this case. In addressing time limits for a refund or credit, Rule 229 provides:

(b) **Relation back to date paid.** Because the time limits relate to the date the taxes, penalties, or interest is paid, a refund application can be timely even though the payment concerned liabilities for a tax year normally outside the time limits. For example, Taxpayer P owes \$1,000 in B&O tax for activity undertaken in December 2000. In January 2001, Taxpayer P makes an arithmetic error and submits a payment of \$1,500 with its December 2000 tax return. In December 2005, Taxpayer P requests a refund of \$500 for the overpayment of taxes for the December 2000 period. This request is timely because the overpayment occurred within the time limits, even though the payment concerned tax liabilities incurred (December 2000) outside the time limits.

Fact situations can be complicated. For example, Taxpayer P pays B&O taxes in Years 1 through 4. The department subsequently conducts an audit of Taxpayer P that includes Years 1-4. The audit is completed in Year 5. As a result of the audit, the department issues an assessment in Year 5 for \$50,000 in additional retail sales taxes that were due from Years 1-4. Taxpayer P pays the assessment in full in Year 6. **In Year 10, Taxpayer P files**

an application requesting a refund of B&O taxes. Taxpayer P's application is timely because it relates to a payment (payment of the assessment in Year 6) made no more than four years before the year in which the application is filed. It does not matter that the taxes relate to years outside the time limits; the actual payment occurred within four years before the refund application. Nor does it matter that the refund is based on an overpayment of B&O taxes while the assessment involved retail sales taxes, because both taxes relate to the same tax years. However, the amount of any refund is limited to \$50,000 - the amount of the payment that occurred within the time limits.

Assume the same facts as described above. When the department reviews Taxpayer P's refund application, it determines that the refund is valid. **After reviewing the new information, however, the department also determines that Taxpayer P should have paid \$20,000 in additional B&O taxes during Years 1-4.** Because Taxpayer P paid \$30,000 more than the amount properly due (\$50,000 overpayment less \$20,000 underpayment), the amount of the refund will be \$30,000.

Rule 229(2)(b) (emphasis added).

The last paragraph quoted above addresses a situation similar to the one at issue here. In that case, the refund application is filed in year 10, at which point the \$20,000 in additional B&O taxes for years 1-4 could not be assessed, but this underpayment is nevertheless used to reduce the refund. So, during the review of the year 10 refund petition, additional liabilities that had not been previously assessed are used to reduce the refund. The Department would not be able to assess the \$20,000 underpayment from years 1-4 in year 10, as that would be barred by the nonclaim statute, RCW 82.32.050(4), but it can use that underpayment to reduce the refund requested.

The Taxpayer generally asserts that the reduction to the refund request is the equivalent of a new assessment. We disagree. The Taxpayer notes the provision of WAC 458-20-230 ("Rule 230") addressing revised assessments that provides:

Revised assessments. The department may issue an assessment to correct errors found in examining tax returns or it may issue an assessment to correct errors based on a review of the taxpayer's records. Assessments which are based on a review of the tax returns are subject to further review and revision by future audit. Once issued, the department may revise an audit assessment subject to the following restrictions.

- (a) The assessment generally may not be increased from the amount originally assessed for those years for which the statute of limitations would have expired if this were an original assessment. For these years an assessment can be reduced, but not increased.
- (b) An assessment may be increased upon discovery of fraud/evasion or misrepresentation of a material fact.

Rule 230(7).

However, here, the Department is not revising a previously issued assessment, but rather is reviewing a refund request. Accordingly, we find that the provisions of Rule 229(2), detailed above, are applicable to the facts at issue. Rule 229 specifically envisions and addresses the use of

new information in the review of a refund claim to generate an offsetting liability even where that offsetting liability could not independently be assessed as a separate assessment. We find the example of Rule 229(2) applicable and controlling here and deny the Taxpayer's petition on this issue.

We find that the Taxpayer has not substantiated that the reduction to the refund claim was improper and sustain the refund as issued and deny the Taxpayer's petition.

DECISION AND DISPOSITION

Taxpayer's petition is denied.

Dated this 21st day of December 2020.