

Cite as Det. No. 97-192R, 18 WTD 188 (1999)

BEFORE THE APPEALS DIVISION  
DEPARTMENT OF REVENUE  
STATE OF WASHINGTON

In the Matter of the Petition For Correction of	)	<u>F I N A L</u>
Refund of	)	<u>D E T E R M I N A T I O N</u>
	)	
	)	No. 97-192R
	)	
...	)	Registration No. ...
	)	FY ... /Audit No. ...
	)	

[1] RULE 230 AND RCW 82.32.060: REFUNDS -- STATUTES -- NONCLAIM STATUTES. RCW 82.32.060 is a nonclaim statute which is procedural in nature. Unless a taxpayer strictly complies with the terms of RCW 82.32.060, the Department of Revenue cannot make any tax refunds.

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.

NATURE OF ACTION:

A taxpayer seeks reconsideration of Det. No. 97-192 on the sole issue whether it is entitled to a tax refund for periods beyond the nonclaim statute.<sup>1</sup>

FACTS:

Gray, A.L.J. -- In Det. No. 97-192, we granted a tax refund of public utility taxes because we concluded that the taxpayer was engaged in interstate commerce when it delivered previously lost or delayed luggage to passengers on behalf of the airlines on which the passengers had flown. We restricted the refund period to those years allowed by RCW 82.32.060. In this particular case, the period was for the tax years 1992-1996. The taxpayer seeks reconsideration of the refund period. It is unnecessary to restate the facts from Det. No. 97-192.

The taxpayer argues that the Department of Revenue (Department) has illegally taxed the taxpayer for many years and that it is not right for the state to keep the money. The taxpayer argues that it sought refunds dating back to 1982 but that, in all communications with the

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

Department, was told that its business activities were taxable. As an example of its early communications with the Department, the taxpayer provided copies of its letter, dated September 7, 1984, to the Interpretation & Appeals Division (the predecessor to the Appeals Division) asking for a “clarification of tax policy regarding shipments of goods originating outside the State of Washington to final destination in Washington,” and the Department’s reply, dated October 26, 1984, stating that the taxpayer’s business activity was “local delivery of baggage [which is] inherently local and is subject to tax.” The taxpayer argues that not only was the Department wrong, but also did not provide any information regarding its appeal rights.

The taxpayer characterizes the Department’s position as a “misrepresentation of material fact” to the taxpayer. The taxpayer cites RCW 82.32.060 and relies upon its reference to the “statutory period for assessment of taxes, penalty, or interest prescribed by RCW 82.32.050” to further argue that, under RCW 82.32.050, the Department may assess taxes, penalties, or interest beyond the usual five-year period “upon a showing of fraud or of misrepresentation of a material fact by the taxpayer.” If the Department has this advantage, argues the taxpayer, then so should the taxpayers if the Department misrepresents a material fact.

The taxpayer also relies upon Laws of 1996, ch. 149 § 1, the findings and intent of the 1996 legislation that amended RCW 82.32.050:

The legislature finds that a consistent application of interest and penalties is in the best interest of the residents of the state of Washington. The legislature also finds that the goal of the department of revenue’s interest and penalty system should be to encourage taxpayers to voluntarily comply with Washington’s tax code in a timely manner. The administration of tax programs requires that there be consequences for those taxpayers who do not timely satisfy their reporting and tax obligations, but these consequences should not be so severe as to discourage taxpayers from voluntarily satisfying their tax obligations.

It is the intent of the legislature that, to the extent possible, a single interest and penalty system apply to all tax programs administered by the department of revenue.

The taxpayer also cites WAC 458-20-230(4) (“Rule 230”) which states:

There is no limitation for the period in which an assessment or correction of an assessment can be made upon a showing of evasion or of misrepresentation of a material fact.

The taxpayer argues that Rule 230(4) does not restrict the misrepresentation of material fact to “taxpayers” and does not specify that the correction of an assessment must necessarily result in increased taxes.

Finally, the taxpayer argues that, although no precedent exists where the department allowed refunds beyond the period covered in RCW 82.32.060, no published decision involves a situation where the Department misinformed a taxpayer as to its tax obligations.

ISSUES:

May the taxpayer obtain a tax refund for tax years beyond those authorized in RCW 82.32.060?

DISCUSSION:

RCW 82.32.060 defines the scope of tax refund requests:

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 shall be credited to the taxpayer's account or shall be refunded to the taxpayer, at the taxpayer's option. Except as provided in subsections (2) and (3) of this section, no refund or credit shall 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.

(Emphasis supplied.) RCW 82.32.060(2) pertains to written waivers under RCW 82.32.050, and RCW 82.32.060(3) pertains to contractors with the United States government.

RCW 82.32.060 is a nonclaim statute. The difference between a nonclaim statute and a statute of limitation has been stated as follows:

This distinction between a statute of limitation and a nonclaim statute is carefully spelled out in Lane v. Department of Labor & Indus., 21 Wn.2d 420, 425-26, 151 P.2d 440 (1944):

There are two types of statutes which the courts had to apply. One of them is the statute which either by its plain terms or by the construction given it by the court makes the limitation of time inhere in the right or obligation rather than the remedy. It is sometimes referred to as a statute of nonclaim, and, strictly speaking, is not a statute of limitations at all. In its usual form the statute creates some right or obligation and a time is fixed within which the right must be asserted or the obligation sought to be enforced, or the same will be barred. When the limitation period expires, the right or obligation is extinguished and cannot be revived by a subsequent statute enlarging the time limitation. Illustrations of nonclaim statutes in this state are those providing for liens of laborers and materialmen, claims against estates of deceased persons, and claims for damages against municipal corporations.

The other type of statute is one which relates only to the remedy and has nothing to do with any right or obligation, does not inhere in either, and is wholly independent of them. It is a statute of limitations in its strict sense, and, although a remedy may become barred thereunder, the right or obligation is not extinguished. It is a statute of repose.

Bellevue School Dist. No. 405 v. Brazier Constr., 103 Wn.2d 111, 118, 691 P.2d 178 (1984).

It was this distinction that the Supreme Court made in Guy F. Atkinson Co. v. State, 66 Wn.2d 570, 572, 403 P.2d 880 (1965), in which the Supreme Court expressly held that RCW 82.32.060 is a nonclaim statute:

Although both plaintiffs and the commission in their respective briefs treat the problem posed by RCW 82.32.060 as one dealing with a statute of limitations, strictly speaking the question presented is one of nonclaim, rather than one of statute of limitations. In the present action, we are concerned with a statute which designates the time allowed for the taking of a step which is a prerequisite to the bringing of an action; we are not concerned with the time allowed for bringing the action. RCW 82.32.060 is procedural, and the limitation it imposes is addressed rather to the power of the tax commission to make a refund and the conditions under which it may be made. However, the general rules of construction for statutes of limitation are applicable to statutes providing for the refunding or recovery of taxes. 51 Am. Jur. Taxation § 1169.

Atkinson then addressed the power of the Department of Revenue (its predecessor was the Washington State Tax Commission) to grant refunds:

No executive or ministerial officer has authority to refund taxes except under express statutory authority. 3 Cooley, Taxation 2506 (4th ed.). Since a right has been granted to plaintiffs to recover an overpayment of tax, the right must be exercised in the manner provided by the statute. 51 Am. Jur. Taxation § 1168. Since plaintiffs have not followed the provisions of RCW 82.32.060 within the time limit specified within that section, plaintiffs have no right to recover any overpayment of tax.

Guy F. Atkinson Co. v. State, 66 Wn.2d at 575.

RCW 82.32.060 refers to the “statutory period” in RCW 82.32.050. The “statutory period” is found in RCW 82.32.050(3), which provides:

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 restricts the number of tax years for which the Department may assess taxes, interest, and penalties. The plain language of RCW 82.32.050 makes clear that the exceptions are situations where the taxpayer (a) has not registered, or (b) committed fraud or made a misrepresentation of a material fact, or (c) executed a written waiver. If one of those three situations exists, then the Department may assess taxes, interest, and penalties beyond the five-year period.

[1] We conclude that the taxpayer is not entitled to a refund for periods beyond those granted in Det. No. 97-192. First, the plain language of RCW 82.32.060 restricts refunds to the four years immediately prior to the beginning of the calendar year in which the refund request was made. As noted in Guy F. Atkinson, *supra*, and in Bellevue School District, *supra*, RCW 82.32.060 is a procedural statute - a nonclaim statute - and the Department of Revenue has no authority to grant refunds for any tax except in the manner provided for in that statute. Second, RCW 82.32.060's reference to "the statutory period" in RCW 82.32.050 refers only to the four-year plus current tax year language. Third, the exceptions in RCW 82.32.050 refer only to actions of a taxpayer, not of the Department, and are exceptions to the limitations on issuing tax assessments. Fourth, the "intent and findings" language from the 1996 legislation is consistent with a tax system that is based upon voluntary compliance. Fifth, Rule 230(4), also cited by the taxpayer, is drawn from an administrative rule that addresses limitations upon tax assessments; it does not address tax refunds at all.

However, this decision should not be read as a "technicality" that allows the Department to escape, because we also disagree with the taxpayer's argument that the Department "misrepresented" material facts to the taxpayer. The Department's instructions to the taxpayer were its responses to the taxpayer's questions, and its responses were not unreasonable responses based upon the information available to it. Washington's tax system is based upon voluntary compliance. The taxpayer knows his or her own business and is required to know how to report. This concept is embodied in RCW 82.32A.030, although it existed prior to adoption as a statute. "We must be able to rely on statements that taxpayers certify are true and correct to administer a tax system based on voluntary compliance." Det. No. 91-009, 10 WTD 375 (1990).

The burden of determining, reporting, and paying taxes falls on each taxpayer. That is, Washington's excise taxes are of a self-assessing nature. Each taxpayer is required to maintain records from which the correct tax liability may be determined. If a taxpayer does not pay a tax when due or properly make a return, "the Department shall proceed, in such manner as it deems best, to obtain facts and information on which to base its estimate of the tax" and shall then assess additional taxes found to be due. RCW 82.32.050, .100.

Det. No. 87-173, 3 WTD 165 (1987).

The taxpayer's chronology shows that the Department audited the taxpayer in 1996, and the Audit Division advised the taxpayer of the its appeal rights to this Division. There is no indication in the taxpayer's chronology of any earlier audits. In 1984, the taxpayer sought advice from the Interpretation & Appeals Division regarding its tax reporting obligations, which it received, but it also says that it was not advised of any further appeal process. The answer is that there was and is no appeal process from instructions regarding reporting requirements.<sup>2</sup> The only way a taxpayer can reach the Board of Tax Appeals, for example, is to appeal a determination issued by this Division concerning a tax assessment (RCW 82.32.160) or a refund request (RCW 82.32.170). The Department did not act improperly because there was no appeal involved in the first instance.

The legislature has clearly stated the period of time available for tax refunds. RCW 82.32.060 states that the period is year in which the application is made plus the four tax years immediately preceding. In this case, the taxpayer made its refund request in 1996. The four years immediately preceding 1996 are 1995, 1994, 1993, and 1992. The taxpayer successfully convinced this Division that it was entitled to a tax refund and its refund will be for those tax years. There is no authority to grant any tax relief for 1991 or any earlier years.

#### DECISION AND DISPOSITION:

The petition for reconsideration is denied.

Dated this 31st day of March, 1998.

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<sup>2</sup> The process has changed in one respect since 1984. Requests for written tax reporting instructions are now provided by the Department's Taxpayer Information & Education Section. If a taxpayer is dissatisfied with those instructions, the taxpayer may appeal those instructions to this Division (Appeals Division). However, in 1984, those written instructions were provided directly by the Interpretation & Appeals Division. The Interpretation & Appeals Division was renamed the Appeals Division in approximately 1997.