Cite as Det. No. 02-002, 22 WTD 131 (2003)

BEFORE THE APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition For Correction of Assessment and Refund of	)	D E T E R M I N A T I O N
	)	No. 02-002
. . .	)	Registration No. . . .
	)	FY . . . /Audit No. . . .
	)	Docket No. . . .

[1] RULE 100, RULE 229; RCW 82.32.050, RCW 83.32.060: B&O TAX – SALES TAX – USE TAX – REFUND -- PETITION – STATUE OF LIMITATIONS – EXTENSION. A petition for review requesting a refund of taxes paid must be filed within four years after the close of the tax year in which the taxes were paid. The Department may not grant an extension of time to file a petition for review requesting a refund of taxes paid.

[2] RULE 100, RULE 230; RCW 82.32.160, RCW 82.32.170: B&O TAX – SALES TAX – USE TAX – CREDIT ASSESSMENT – INCREASE ADJUSTMENT -- STATUTE OF LIMITATIONS. A credit assessment will not be increased from the amount originally credited for those years for which the statute of limitations would have expired, unless a refund claim was filed or a waiver executed prior to the expiration date. An assessment may be reduced after the expiration date, but not increased.

[3] RULE 100; RCW 82.32A.020: B&O TAX – SALES TAX – USE TAX – OFFSET – TAX PROPERLY DUE. Different types of taxes and credits are considered together on taxpayers' returns and in the Department's assessments to calculate the amount of tax properly due or refundable.

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 software developer, found to be a manufacturer, seeks a manufacturing machinery and equipment (M&E) sales and use tax exemption credit while relying on a TI&E letter that it was not a manufacturer for B&O tax purposes.

FACTS:

M. Pree, A.L.J. -- . . . , (taxpayer) designed and developed computer software programs in Washington. The taxpayer sent a master or "golden" copy of the software to an in-state duplication house, which duplicated and packaged the canned software.[1] The taxpayer sold or licensed the software programs to resellers, hardware manufacturers, and consumers worldwide. The duplication house shipped the program directly to the taxpayer's customers.

On March 11, 1994, the taxpayer requested a written ruling from the Department of Revenue (Department) that it was not a manufacturer. The Department's Taxpayer Information and Education Section (TI&E) replied in a letter dated April 8, 1994, and confirmed the taxpayer's understanding by stating:

> Under the facts stated in your letter, I agree that [the taxpayer] is not taxable as a manufacturer. However, its sales to customers in Washington are subject to retailing or wholesaling business and occupation tax. If the Washington sales are to consumers, the sales are also subject to sales tax.

The taxpayer followed TI&E's ruling. Several years later, the Department's Audit Division reviewed the taxpayer's books and records for the period beginning January 1, 1996 through June 30, 1998. The Audit Division issued the assessment referenced above on December 11, 2000. The Audit Division found the taxpayer was a manufacturer, but allowed the taxpayer to report as instructed by TI&E through the audit period. The Audit Division instructed the taxpayer:

> Effective June 1, 1999, you are instructed to report your sales of software to all customers under the manufacturing B&O tax classification in addition to other B&O tax categories currently being reported. (See attached letter from [TI&E] dated May 6, 1999).

Prior to the completion of the audit, on May 6, 1999, TI&E rescinded its April 8, 1994 letter, stating:

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[1] "Canned software," means software that is created for sale to more than one person. RCW 82.04.215 (effective July 1, 1998). Prior to adoption of the statutory definition, under the Department's Rule 155 (WAC 458-20-155), "canned software" was also called "standard, prewritten program" or "off-the-shelf" software, and included software that was not originally developed and produced for the user. The taxpayer's appeal spans the period when Rule 155 was in effect as well as the new statute.

> In a letter dated April 8, 1994 . . . [TI&E] advised your representative . . . that your business was not subject to tax as a manufacturer when third parties reproduced software created by your company. That advice was not correct and is hereby rescinded. At the time, . . . [TI&E] wrote to . . . [the taxpayer's representative it] was unaware of two decisions that held the activity at issue was manufacturing.
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> [TI&E has] been in contact with the Audit Division regarding the current audit examination of your business activities. Because your business relied on specific tax reporting instructions provided by an agent of the Department of Revenue, we will not require retroactive payment of taxes on the area covered by the rescinded letter. Rather you are instructed to report your tax liability in conformance with the instructions given to you in the audit report starting on June 1, 1999.

In this appeal, the taxpayer seeks to rely on the TI&E letter that it was not a manufacturer for the purpose of determining its business and occupation (B&O) tax only. At the same time, the taxpayer requests a refund of retail sales tax and use tax paid during the audit period (plus interest) under the machinery and equipment (M&E) exemption.[2] The taxpayer relies on the 1999 finding that it was a manufacturer for sales and use tax only, a requirement for the exemption. The taxpayer estimates $ . . . is at issue. During the hearing, the taxpayer stated it did not know whether this refund request exceeded the amount of B&O tax it would have paid, had it been taxed as a manufacturer during the audit period.

The Audit Division's response to the taxpayer's refund claim is if the taxpayer is considered to be a manufacturer for the audit period and allowed sales and use tax credits based upon an M&E exemption, then the taxpayer should be considered a manufacturer for B&O tax purposes. In which case, the Audit Division would then assess manufacturing B&O tax up to the amount of the M&E credit allowed. In addition, the Audit Division notes the taxpayer filed its petition (dated February 9, 2001) on February 13, 2001, beyond the statute of limitations for a refund of its 1996 taxes.

The taxpayer disagrees that 1996 is barred by the statute of limitations. The taxpayer asserts that its M&E refund or credit petition is timely under the "doctrine of equitable tolling," which taxpayer explains prevents the statutory period from running in limited circumstances. We do not find the doctrine applicable in our case.[3] The Audit Division did not consider the M&E

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[2] RCW 82.08.02565 and RCW 82.12.02565.

[3] The taxpayer quotes a Court of Appeals decision, *Danzer v. Department of Labor and Ind.*, 104 Wn.2d 307, 318, 16 P.3d 35 (2000). That [case] permits equitable tolling, under "appropriate circumstances," which include bad faith, deception, lack of notice of filing requirements, or false or misleading assurances by the Department [Labor and Industries], and the exercise of diligence by the employer." The predicates for equitable tolling are bad faith, deception, or false assurances by the defendant and the exercise of diligence by the plaintiff. *Millay v. Cam*, 135 Wn.2d 193, 206, 955 P.2d 791 (1998). We have no evidence of such a circumstance in this case, nor does the taxpayer claim such circumstance exists. In fact, the taxpayer states it did not rely on the auditor's judgment, but conducted an independent evaluation of the transactions during the audit period. We further emphasize, it was the taxpayer that came to the Department in 1994 asserting that it was not a manufacturer, and the taxpayer benefited for years by paying B&O taxes based upon a significantly lower measure of tax. The taxpayer requested it not be

issue. The audit included examination of the taxpayer's capital purchase invoices to verify whether the taxpayer paid retail sales tax, and if not, the auditor checked the taxpayer's use tax accrual records to determine whether use tax was properly assessed. There is no written record or other indication that the M&E exemption issue was raised or considered. [4]

Finally, the taxpayer raises an unrelated factual verification issue. The taxpayer's petition also states the Audit Division erred by failing to include expenses from all of its qualified research activities for the purpose of the high technology tax credit provided in RCW 82.04.4452. The taxpayer requests we remand the issue to the Audit Division to review records not available during the audit. The Audit Division has agreed to consider the additional records to verify the amount of qualified research activities for the high technology tax credit, and revise the assessment subject to the statute of limitations.

We must first determine the period under which we have authority to consider the taxpayer's February 2001 petition as both an M&E refund claim, and as a petition for correction of the assessment, increasing the taxpayer's credit based upon its M&E claim. We will then determine whether the taxpayer could rely on the 1994 TI&E letter for B&O purposes only, and not for sales and use tax purposes.

ISSUES:

1. May the Department consider a refund petition filed in 2001 for the 1996 period and refund or credit taxes paid in 1996 based on the petition filed by the taxpayer in February 2001?

2. May the Department increase the December 9, 2000 credit assessment for the 1996 period and refund or credit taxes paid in 1996 based on the petition filed by the taxpayer in February 2001?

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taxed as a manufacturer. The taxpayer benefited from its B&O treatment during the entire audit period (and during years prior to the audit period and nearly a year after the audit period). The taxpayer asserts the Department is estopped from taxing the taxpayer as a manufacturer *for B&O purposes* only. The taxpayer has refused overtures to allow an M&E credit if offset by the B&O benefits from the finding the taxpayer was not a manufacturer. In this situation, equitable doctrines are inappropriate. Courts recognize the unfairness of limiting either taxpayers or the governmental entities that benefit by preventing something from occurring then avail themselves to the nonperformance of the thing they occasioned. *See, e.g. R.H. Stearns Co. v. United States*, 291 U.S. 54, 61 (1933). The taxpayer's situation does not fit within a specific doctrine, such as the tax benefit rule, equitable recoupment, or equitable tolling. Therefore, because we find the taxpayer benefited by paying B&O taxes using a low measure of tax not available to manufacturers, the taxpayer's request for a refund as a manufacturer for the purpose of the M&E exemption is inconsistent with its B&O tax benefit. Equitable doctrines are inapplicable.

[4] We also checked with the Audit Division regarding whether the taxpayer had requested a refund based upon the M&E exemption during the audit period. The revenue auditor states he did not consider the M&E issue because he did not consider the taxpayer a manufacturer. The field audit manager indicated the M&E exemption issue had not been mentioned until we forwarded a copy of the taxpayer's February 9, 2001 petition to him.

3. Could the taxpayer rely on the TI&E letter for B&O purposes, but not for sales and use tax purposes?

DISCUSSION:

The taxpayer requests a refund or credit of retail sales taxes and use taxes paid on machinery and equipment from January 1, 1996 through June 30, 1998. Tax statutes conferring credits, refunds, or deductions are strictly construed. *Lacey Nursing v. Department of Rev.*, 128 Wn.2d 40, 49, 905 P.2d 338 (1995).

[1] **Can we consider the February 9, 2001 petition, as a petition for refund of the taxpayer's 1996 taxes?** The taxpayer's first request for this additional credit or refund was its petition dated February 9, 2001. The examination of the taxpayer's records was complete when the audit report was issued on December 11, 2000. Because the audit resulted in a credit assessment, the taxpayer did not pay anything on the assessment. Rather, the taxes for which the taxpayer seeks a refund were paid to retailers or paid with its combined monthly excise tax returns.

The Department's refund Rule 229 (WAC 458-20-229) directs taxpayers seeking a refund of retail sales taxes paid to retailers, to first request the refund from the seller in subsection (3)(b)(ii).[5] In certain situations, the Department will consider refunding the taxes directly to the taxpayer. *Id.* Subsection (4)(f) of Rule 229 encourages taxpayers to sign waivers if the statute of limitations will expire within a short period.[6] Subsection (3)(b)(iii) states the statute of limitations is determined based on the date the assessment was paid.

The taxpayer did not pay any taxes as a result of the assessment, because nothing was due as a result of the assessment. Any taxes, which could be credited or refunded, were paid on the taxpayer's combined excise tax returns. Therefore, the applicable statute of limitations is based upon the tax

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[5] Subsection (3)(d) provides an exception for court actions:

> (i) In the case of court actions regarding refund or credit of retail sales taxes, the department will not require that consumers obtain a refund of retail sales tax directly from the seller if it would be unreasonable and an undue burden on the person seeking the refund to obtain the refund from the seller. In this case the department may make the refunds directly to the claimant and may use the public media to attempt to notify all persons who may be entitled to refunds or credits.

We also note the statute of limitations for taxpayer actions against sellers may limit their ability to collect from the sellers. *See Urban Construction v. Seattle Urban League,* 935 12 Wn. App. 935, 533 P.2d 392 (1975).

[6] Specifically Rule 229(4)(f) provides:

> (f) Generally, refund or credit requests require verification by the department through a review of specific taxpayer records which have a bearing on the refund or credit request. If the refund or credit request relates to a year for which the statute of limitations will expire within a short period, the department may be able to more promptly issue a refund by delaying the verification process until it is more convenient to the taxpayer and/or the department if the taxpayer will execute a statute of limitations waiver.

return payments and not on when the audit was completed or the assessment issued. RCW 82.32.060(1) and RCW 82.32.050(3) limit refund applications and assessments to four years after the close of the tax year. No refund or credit can 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.[7] RCW 82.32.060(1).

Because we received the taxpayer's petition more than four years after the close of the 1996 tax year, we are without authority to refund taxes paid in 1996, [except for the December 1996 taxes paid in January 1997]. Taxpayers must apply for refund within the time limit specified in the statute to be entitled to the statutory right to recover overpayment of taxes. *See Guy F. Atkinson Co. v. State*, 66 Wn.2d 570, 575, 403 P.2d 880 (1965).[8]

In subsection (2)(a) of the Department's Rule 100 (WAC 458-20-100) we recognize the statute of limitations for refund periods, by distinguishing appeals of departmental actions from refund requests:

> (2) **Time for filing of petitions - extensions.** A review of a departmental action is started by the filing of a petition for review. A petition for review must be filed with the department within thirty days after the date the departmental action has occurred.
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> (a) A petition for review requesting a refund of taxes paid must be filed within four years after the close of the tax year in which the taxes were paid. Therefore, the department may not grant an extension of time to file a petition for review requesting a refund of taxes paid.

The Department cannot grant an extension of time for the taxpayer to file a petition for review requesting a refund for 1996 under subsection (2)(a) of Rule 100.

The taxpayer's June 15, 2001 supplemental petition cites the Washington Supreme Court decision, *Paccar, Inc. v. Department of Rev.*, 135 Wn.2d 301, 957 P. 2d 669 (1998). Paccar overpaid its B&O taxes from 1977 through 1981. Following an audit of that period, in 1983 Paccar paid a deficiency assessment representing sales, use, and B&O taxes. In 1985, Paccar filed a refund petition for refund of the 1983 deficiency assessment taxes paid in 1983. *Paccar* at 320. Prior to the *Paccar* decision, the Department recognized Paccar had filed its petition within four years of paying the 1981 taxes, and refunded the 1981 B&O taxes overpaid with its returns, and the deficiency assessment attributable to 1981 B&O taxes. *Id.* Because $120,152 B&O taxes paid in 1981 had been refunded, the Court netted the refunded amount against the B&O taxes overpaid during the 1977-1981 period.

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[7] Except as provided in RCW 82.32.060(2) and (3). Neither (2), which involves signing waivers of the limitation period, nor (3) involving federal government contractors and subcontractors, is applicable.

[8] The taxpayer quotes the court's elaboration in *Atkinson* that RCW 82.32.060 is a nonclaim statute. On page 575 of the *Atkinson* decision, the legislature limits our refund authority to the time specified in RCW 82.32.060.

The Court considered what additional amount of refund, if any, Paccar was entitled to as a result of its 1977-1981 overpayment. The Court determined:

> Under RCW 82.32.060, a taxpayer may receive a refund of excess taxes paid upon a deficiency assessment calculated for a period prior to the statutory four-year refund period if the taxpayer files a petition for refund within four years of actual payment of the deficiency assessment.

Id. at 321.

The taxpayer did not pay the 1996 taxes within the four-year period of its petition. Therefore, we may not consider the . . . February 9, 2001 [petition for refund] of [the] 1996 sales and use taxes on M&E [except for the December 1996 taxes paid in January 1997].

[2] **May we increase a credit assessment[[9]] for 1996?** The taxpayer's petition requests an increase in the credit assessment. The Department's Rule 230 restricts revisions to assessments for which the statute of limitations would have expired in subsections (7) and (8):

> (7) **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.
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> (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.
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> (b) An assessment may be increased upon discovery of fraud/evasion or misrepresentation of a material fact.
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> (8) **Assessments following conditional refunds or credits.** Taxpayers may petition for a credit or refund of overpaid taxes by following the procedures in WAC 458-20-229. The department at its option may grant such credits or refunds without further immediate verification. If it is later determined that a refund was granted in error and that there was no fraud/evasion or misrepresentation of a material fact, the department may issue assessment is issued within four years from the close of the tax year in which the tax was incurred or within a period covered by a statute of limitations waiver.

Once issued, restrictions apply to revising assessments. Specifically, if the statute of limitations would have expired if it were an original assessment, the amount of the assessment may not be increased, only reduced. The statue of limitations for the 1996 tax year expired December 31, 2000. We may not increase the amount originally assessed unless an exception applies. The taxpayer did

[[9] The term "credit assessment" is a term of art used by the Department when it audits the taxpayer's records and determines the taxpayer overpaid taxes. It is technically not an assessment because no additional taxes were found to be due.]

not request a waiver or make an application for refund prior to the expiration of the statute of limitations for the 1996 tax year. Because this is a "credit" assessment any additional increase would be a claim for refund and is subject to the non-claim application requirements of RCW 82.32.060.

We could, and did on January 10, 2001, grant a 30-day extension allowing the taxpayer to appeal the tax assessment. On February 13, 2001, we received the document dated February 9, 2001, which the taxpayer labeled, "PETITION" only. Following the heading, "**Relief Requested:"** the taxpayer wrote, "An abatement of tax and interest on the issues specified herein." Following "**Amount At Issue:**" the taxpayer wrote, "$ . . . (estimate)." The taxpayer has since supplemented its petition. The taxpayer explains we should refund sales taxes and use taxes paid during the audit period on exempt machinery and equipment under RCW 82.08.02565 and RCW 82.12.02565, because it was a manufacturer, but not change its B&O classification to manufacturing during that period because it could rely on the April 8, 1994 TI&E letter.

The taxpayer's supplemental petition quotes a portion of subsection (1) of the Department's Rule 100 regarding appeals of Departmental actions:

> Any taxpayer who has been issued a notice of departmental action or having paid any tax administered by chapter 82.32 RCW may petition the department of revenue for the review of the action or for a determination of the taxpayer's liability for the tax paid. Departmental actions subject to review include but are not limited to:
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> (a) A notice of assessment of additional taxes, of use tax due, or of tax balances due;
> (b) A notice of penalties or interest due;
> (c) A notice of delinquent taxes, including a notice of tax collection activities; and
> (d) An order revoking a certificate of registration.

The Audit Division issued a credit assessment on December 11, 2000. The taxpayer requested an extension to file an appeal. We responded on January 10, 2001 by granting an extension to appeal the tax assessment. There is no reference to any refund.
The taxpayer sent its petition on February 9, 2001. As discussed above, subsection (2)(a) of Rule 100 requires a petition for review requesting a refund of taxes paid must be filed within four years after the close of the tax year in which the taxes were paid. The Department may not grant an extension of time to file a petition for review requesting a refund of taxes paid.

The additional four-year requirement for review of Departmental actions involving refunds is statutory, which we may not extend without statutory authority. *See Guy F. Atkinson Co. v. State*, 66 Wn.2d 570, 575, 403 P.2d 880 (1965). The thirty-day requirement for petitions for review for deficiency assessments involving additional taxes due is mandated by RCW 82.32.160. In contrast, RCW 82.32.170 applies to petitions involving refunds of taxes that have been paid. RCW 82.32.170 begins by stating, "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, . . ."

The four-year time limitation for refund is provided by reference in RCW 82.32.060 to RCW 82.32.050, which provides in subsection (3):

> (3) 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).

The taxpayer did not execute a waiver to extend the four-year limitation. The taxpayer paid these taxes in 1996 either to retailers or with its combined excise tax returns. We are without authority to increase the amount of credit granted in the December 11, 2000 assessment for the 1996 tax period. We will however, consider the petition timely filed for refund of taxes paid in 1997 and 1998.

[3] **Could the taxpayer rely on the TI&E letter for B&O purposes, but disregard the letter for M&E sales and use tax purposes?** In 1994, at the taxpayer's request, TI&E on behalf of the Department, ruled the taxpayer was not a manufacturer. The taxpayer, TI&E, and the Audit Division now agree the taxpayer was a manufacturer during the audit period. However, the Audit Division and TI&E agreed to follow the 1994 ruling under the authority of Rule 100(9), which states:

> (9) **Rulings of prior determination of tax liability.** Any taxpayer may make a written request to the department for a written opinion of future tax liability. Such a request shall contain all pertinent facts concerning the question presented and may contain a statement of the taxpayer's views concerning the correct application of the law. The department shall advise the taxpayer in writing of its opinion. The opinion shall be binding upon both the taxpayer and the department under the facts presented until the department changes the opinion by a determination or subsequent opinion issued to the taxpayer, or the legal basis of the opinion has been changed by legislative, court, or WAC rule action. When changes occur, a taxpayer may contact the department to determine if a change in the legal basis of the opinion has occurred. Any future change in the opinion shall have prospective application only.

The Department advised the taxpayer that it was not a manufacturer. The written opinion did not limit the application of this finding to B&O taxes. In fact, the TI&E letter instructed the taxpayer to collect sales taxes on products sold in Washington. The TI&E letter was binding upon both the taxpayer and the Department under the facts presented until the Department changed the opinion by a determination or subsequent opinion issued to the taxpayer.

The taxpayer contends the M&E exemption did not exist in 1994 when TI&E issued the letter agreeing that the taxpayer was not a manufacturer, and therefore, the letter cannot be treated as a Department instruction with respect to the taxpayer's M&E eligibility. We acknowledge the M&E exemption was not effective until July 1, 1995, and not enacted until after TI&E sent its ruling to the taxpayer. However, nothing in the newly enacted legislation changed the legal basis of the opinion that the taxpayer was not a manufacturer. The Department's Rule 13601 (WAC 458-20-13601) recognizes for the purpose of the M&E exemption sought by the taxpayer, the term "manufacturer" has the same meaning as it does for B&O tax.[10] Under Rule 100(9), the April 8, 1994 TI&E letter was binding upon both the taxpayer and the Department.

The Department allowed taxpayers to rely on Departmental rulings, and adopted Rule 100(9) in 1990 based on established common law equitable principles in Washington tax law, such as detrimental reliance. An administrative agency may not retroactively impeach its own general rules because of asserted errors of fact, judgment or discretion on its own part. If it were permissible for a taxing agency to challenge, years later, such rules promulgated by its own enforcement agency, taxpayers would never be able to close their books with assurance. *Hanson Baking Co. v. City of Seattle*, 48 Wn.2d 737, 296 P. 2d 670 (1956). Subsection (9) of Rule 100 was based on this equitable principle.

In 1991, the legislature codified the Taxpayer Rights and Responsibilities in Chapter 82.32A RCW. Specifically, RCW 82.32A.020(2) affords taxpayers:

> The right to rely on specific, official written advice and written tax reporting instructions from the department of revenue to that taxpayer, and to have interest, penalties, and in some instances, tax deficiency assessments waived where the taxpayer has so relied to their proven detriment . . . .

Rule 100(9) explains that a taxpayer may request a ruling binding upon the Department and the taxpayer of its future tax liability. In the taxpayer's case, the taxpayer requested and received written guidance from the Department's TI&E Division. Specifically, it asked TI&E, based on its own description of its business activities, to confirm that it was not a manufacturer and did not have to report its gross receipts under the manufacturing B&O tax classification. In the audit of taxpayer's records, the Audit Division applied the 1994 TI&E letter that stated the taxpayer was not a manufacturer for the audit period, but did find that the taxpayer was a manufacturer and issued prospective reporting instructions. Thus the taxpayer from 1994 until June 1, 1999 reported its taxes in a manner consistent with its own description of its business activities and the TI&E 1994 ruling.

Now the taxpayer asserts the TI&E letter was incorrect, and as a manufacturer at all times was entitled to sales and use tax exemptions under RCW 82.08.02565 and RCW 82.12.02565. In short,

[10] The taxpayer contends because the rule was not adopted until later, the definition of manufacturer was not necessarily the same for B&O taxes as it was for the M&E exemption. This definition in the Rule has been the Department's position since the time the statute has been enacted.

the taxpayer requests we treat the taxpayer as a manufacturer, not just for future periods, but for the audit period, but only for M&E purposes, and requests a $ . . . refund of sales and use taxes. In other words, it does not request adjustment to its improper retailing B&O classification. The taxpayer claims it overpaid retail sales tax and use tax during the audit period because those taxes should have been exempt on purchases of qualified machinery and equipment.

The taxpayer sought and obtained a ruling that it was not a manufacturer from the Department. The taxpayer asks to rely on the TI&E ruling for B&O tax purposes only, while requesting a refund or credit of sales and use taxes paid during the same period by asserting that actually it was a manufacturer. We find the Department's credit assessment was consistent with that ruling not only for B&O taxes, but also for sales and use taxes during the audit period. If, therefore, the taxpayer is to receive M&E credit based on its business activities reclassification from retailing to manufacturing, its B&O taxes must be recalculated based on the manufacturing B&O classification rate. If an M&E credit is allowed, additional B&O taxes computed as a manufacturer should be subtracted from the taxpayer's M&E credit.[11]
The statutes and Rules as provided herein do not allow the taxpayer to gain an advantage by relying on the position it solicited from TI&E that it was not a manufacturer, while requesting a refund during the same period based upon a later determination, that in fact it was a manufacturer. We note RCW 82.32A.020(2), allows deficiencies waived *in some instances* where the taxpayer has relied on the Department's instructions to its proven detriment.

Selective application of the ruling solicited by the taxpayer is not an appropriate instance to waive the deficiency under RCW 82.32A.020(2). We raised the question of actual detriment to the taxpayer from relying on this ruling during the teleconference, when we inquired about the B&O taxes it would have paid as a manufacturer relative to the sales and use tax refund it seeks during this period. The taxpayer said it did not know. Therefore, we are not aware of the detriment to the taxpayer from its reliance on this ruling. We will remand the assessment to the Audit Division to recompute the tax properly due for January 1, 1997 through June 30, 1998 based upon the finding that the taxpayer was a manufacturer.

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[11] Example (g) in Rule 230(9) demonstrates how the Department could offset refunds with taxes that should have been assessed:

> (9)(g) In 1992 the department audited the records of XYZ Hauling for the years 1988 through 1991. The audit disclosed that some income from hauling performed in 1988 had not been reported and issued an assessment in 1992 for additional taxes owed under the motor transportation public utility tax. The taxpayer paid the assessment in 1992. In 1994 the taxpayer contacted the department with additional records which disclosed that part of the hauling for which motor transportation tax was assessed for the year 1988 should have been assessed under the urban transportation classification, a lower tax rate. The taxpayer requested that all of the motor transportation tax be refunded and argued that the urban transportation tax could not be assessed since the statute of limitations had expired for the year 1988. The department issued a revised assessment in which it subtracted the tax that should have been paid under urban transportation from the motor transportation tax which was assessed. The department refunded the difference. The revised assessment did not result in additional taxes being assessed, but was a reduction of the original assessment.

RCW 82.32.060 provides our authority to refund "any amount of tax, penalty, or interest has been paid in excess of that properly due." The taxpayer may not separate the 1994 ruling's application to B&O tax from the sales and use tax refund. As discussed above, the TI&E ruling was not limited to B&O taxes. The Audit Division must determine the amount of tax properly due:

> Where a taxpayer, in computing his particular tax liability for a given period, erroneously includes certain items in his computation which are subsequently declared nontaxable, and pays a sum deemed owed by reason of the erroneous inclusion, two situations may arise:
>
> (1) If the amount paid is less than he should have paid, based on properly taxable items, the taxpayer will not be entitled to a refund of the amount attributable to the erroneous inclusion of nontaxable items. By statute, his refund or credit is limited to the amounts in excess of that properly due.
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> (2) If the amount paid is more than he actually owed, based on properly taxable items, he will be entitled to a refund of the excess amount, provided petition for refund is timely filed. However, his refund will be limited to the amount exceeding that "properly due," regardless of the amount attributable to the erroneous inclusion of nontaxable items. Only the amount exceeding that which is properly due would be refundable under the statute.

Puget Sound Power & Light Co. v. State, 70 Wn2d 493, 496-7, 424 P.2d 634 (1967). 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:

> Different types of taxes and credits are considered together on taxpayers' returns and in the Department's assessments to calculate the amount of tax properly due or refundable.

Paccar, Inc. v. Department of Rev., 135 Wn2d 301, 320-321, 957 P. 2d 669 (1998).[12] *See also* WAC 458-20-230(9)(g).

Should the taxpayer's activities be reclassified to manufacturing, additional manufacturing B&O taxes must be subtracted from any sales and use taxes paid from January 1, 1997 through June 30, 1998, for which the taxpayer verifies it met the requirements for the M&E exemption. The assessment is remanded to the Audit Division and, if appropriate, a post audit adjustment will be issued for the January 1, 1997 through June 30, 1998 period revising the amount of all taxes properly due.

DECISION AND DISPOSITION:

We grant the taxpayer's petition in part. We remand the assessment to the Audit Division to recompute the tax properly due classifying the taxpayer as a manufacturer for the period January

[12] We recognize RCW 82.32.060 has been amended. However, the applicable "amount properly due" language, upon which *Puget Sound Power* and *Paccar* were based, remains unchanged.

1, 1997 through June 30, 1998. Records available for the high technology credit may also be reviewed.

Dated this 7th day of January, 2002.