

Cite as Det. No. 98-104, 18 WTD 66 (1999)

BEFORE THE APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition For Correction of)	<u>D E T E R M I N A T I O N</u>
Interpretation of)	
)	No. 98-104
)	
...)	Registration No. . . .
)	Appeal of Letter Ruling
)	
)	
)	

RULE 242A; RCW 82.34.060: POLLUTION CONTROL TAX CREDIT — ASSIGNMENT – THIRD-PARTY ASSIGNEES. Accrued, but unused, pollution control tax credits follow the pollution control facility and are available to an assignee of the original installer when the facility has also been transferred. The credits are not available to a third-party that is not also the transferee of the facility.

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:

Operator of pulp mills protests a letter ruling holding the company could not assign pollution control tax credits other than to a subsequent purchaser of the pollution control facility.¹

FACTS:

Mahan, A.L.J. -- The taxpayer operated two pulp mills in Washington state, one in [A] and one in [B]. The mill in [B] has been sold. It plans to close the [A] pulp mill because there is no prospective purchaser for that mill.

The Department of Revenue (Department) issued pollution control tax certificates for both of the pulp mills, which entitled the taxpayer to statutory tax credits. Under Chapter 82.34 RCW and

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

WAC 458-20-242A half of the certified costs of eligible pollution control equipment are subject to a credit, with the credit accruing at the rate of 2% of the cost of the equipment for each year the certificate is in force. The accrued credit can be used to offset up to one-half of the taxpayer's business and occupation tax obligations during a reporting period. Although the taxpayer assigned the certificate to the new owner of the [B] pulp mill, it retained the accrued, but unused, credits associated with that facility. It also has accrued, but unused, credits associated with the [A] pulp mill. Currently, the taxpayer has credits in excess of \$5,000,000 in accrued but unused credits.

The taxpayer plans to assign the accrued credits to a third-party. It sought a letter ruling from the Department's Taxpayer Information and Education Section (TI&E) on the assignment of the credits. The taxpayer relied on the decision in Publishers Forest Products Co. v. Washington, 81 Wn.2d 814, 505, P.2d 453 (1973) to support the assignment of the credits. In a letter dated April 3, 1997, TI&E held that the credits could not be assigned to anyone other than the purchaser of the facility. It reasoned as follows:

[W]e find no implication whatsoever in the decision that the assignment of the credit can be made to anyone other than the transferee of the pollution control facility. Thus, in a case where the facility is shut down and there is no transferee, any unused credits remain with [the taxpayer].

The taxpayer appealed this ruling and further relies on the decision in Puget Sound National Bank v. Department of Rev., 123 Wn.2d 284, 868 P.2d 127 (1994) to support its assignment claim.

ISSUE:

Can pollution control credits be assigned to a third-party who is not also the assignee of the pollution control certificate?

DISCUSSION:

[1] RCW 82.34.060 provides for the accrual of pollution control credits. With respect to those credits, the statute provides that the credits are subject "only" to four limitations, which concern the amounts that can be claimed during any reporting period. It provides as follows:

(2) When the operation of a facility has commenced and a certificate pertaining thereto has been issued, a credit may be claimed against taxes imposed pursuant to chapters 82.04, 82.12 and 82.16 RCW. The amount of such credit shall be two percent of the cost of a facility covered by the certificate for each year the certificate remains in force. Such credits shall be cumulative and shall be subject only to the following limitations:

(a) No credit exceeding fifty percent of the taxes payable under chapters 82.04, 82.12 and 82.16 RCW shall be allowed in any reporting period;

(b) The net commercial value of any materials captured or recovered through use of a facility shall, first, reduce the credit allowable in the current reporting period and thereafter be applied to reduce any credit balance allowed and not yet utilized: PROVIDED, That for the purposes of this chapter the determination of "net commercial value" shall not include a deduction for the cost or depreciation of the facility.

(c) The total cumulative amount of such credits allowed for any facility covered by a certificate shall not exceed fifty percent of the cost of such facility.

(d) The total cumulative amount of credits against state taxes authorized by this chapter shall be reduced by the total amount of any federal investment credit or other federal tax credit actually received by the certificate holder applicable to the facility. This reduction shall be made as an offset against the credit claimed in the first reporting period following the allowance of such investment credit, and thereafter as an offset against any credit balance as it shall become available to the certificate holder.

(Emphasis added.) Under subsections (b) and (d), as quoted above, the amount of any credit balance may be reduced based either on the value of any materials captured or recovered through use of a facility or on the amount of any federal investment credit received by the certificate holder. The statute further requires certificate holders to make books and records available in order to determine the amount any credit that may be available, as follows:

(3) Applicants and certificate holders shall provide the department with information showing the net commercial value of materials captured or recovered by a facility and shall make all pertinent books and records available for examination by the department for the purposes of determining the credit provided by this chapter.

These provisions make it clear that a credit and any credit balance are tied in to the operation of the facility and to any investment tax credits claimed by the certificate holder. Further, any credit claim is subject to a review of the certificate holder's book and records.

In Publishers Forest Products Co. v. Washington, 81 Wn.2d 814, 815, 505, P.2d 453 (1973), the court faced the issue "whether a pollution control tax credit granted pursuant to RCW 82.34.060(2) is available to an assignee of the original installer when the facility has been transferred." In discussing this issue, the court stated:

The failure to limit the statute's applicability to the original installer alone indicates an intent by the legislature to allow the tax credit to follow the owner of the facility. This conclusion is buttressed by the fact that the amount of the credit allowed for a reporting period is offset by the net commercial value of any materials captured or recovered through use of the facility. RCW 82.34.060(2)(b).

...

For these reasons, we believe the various provisions of the statute can be harmonized only if the certificate is deemed capable of assignment to the subsequent purchaser of the original qualifying certificate holder.

Id. at 817-18.² Based on its analysis of the pollution control credit provisions, the court concluded:

We hold the statute indicates the credit follows the pollution control facility, and is available to an assignee of the original installer when the facility has also been transferred.

Id. at 817. The court made no distinction between accrued and non-accrued credits.

In reaching its conclusion, the court recognized the statute does not expressly limit the assignment of credits. However, it concluded the statutory language indicated that the assignment of the credits follow the pollution control facility. In other words, although not expressly prohibited, the assignment of credits was limited to the transferee of the facility.

We recognize that the issue before the court in Publishers Forest Products did not directly involve accrued, but unused, credits. The reasoning by the court, however, applies equally to such credits. All credits, whether accrued or accruing, are subject to setoff based on the commercial value of materials captured by the facility or by the certificate holder's receipt of investment tax credits. Further, such credits are subject to a review of the certificate holder's books and records. For the same reasons, we conclude that accrued credits follow the pollution control facility and are not available to a third-party who is not the transferee of the facility.

Such a conclusion is in harmony with the statutory language as a whole. It is also consistent with the general rule that credit provisions are to be strictly construed. See, e.g., International Paper Co. v. Department of Rev., 92 Wn.2d 277, 279, 595 P.2d 1310 (1979).

DECISION AND DISPOSITION:

The taxpayer's petition is denied

Dated this 22nd day of June 1998.

² In general, tax credits are assignable unless assignment is expressly prohibited. See Puget Sound National Bank v. Department of Rev., 123 Wn.2d 284, 868 P.2d 127 (1994).