

Cite as Det. No. 15-0125, 35 WTD 66 (2016)

BEFORE THE APPEALS DIVISION  
DEPARTMENT OF REVENUE  
STATE OF WASHINGTON

In the Matter of the Petition for Refund of ) D E T E R M I N A T I O N  
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  )  
  No. 15-0125  
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  Registration No. . . .  
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WAC 458-20-257; RCW 82.32.545; RCW 82.32.534; RCW 82.04.260(11); RCW 82.04.4461: MANUFACTURING B&O TAX – AEROSPACE MANUFACTURING B&O TAX RATE – B&O TAX CREDIT FOR QUALIFIED AEROSPACE PRODUCT DEVELOPMENT SPENDING - FILING DATE FOR ANNUAL REPORT. For otherwise qualifying activities occurring in annual 2009, in order to be eligible for the benefits of the preferential aerospace manufacturing B&O tax rate under RCW 82.04.260(11) and the B&O tax credit for qualified aerospace product development spending under RCW 82.04.4461, the required annual report due for those programs must be filed no later than March 31, 2010, or any extension thereto.

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.

LaMarche, A.L.J. – An aerospace manufacturer appeals the Department of Revenue's (Department) denial of its refund request, based on reclassification of its business activities in a prior tax period to the preferential aerospace manufacturing business and occupation (B&O) tax classification and the allowance of an aerospace B&O tax credit for that period. The Department denied the refund request on the basis that the manufacturer had failed to timely file its required annual report for the disputed period, and was therefore, not entitled to the tax benefits for that period. We conclude that the annual report was not timely filed and deny the petition.<sup>1</sup>

ISSUE

Under RCW 82.32.545<sup>2</sup> and WAC 458-20-267 (Rule 267), for business activities during calendar year 2009, when is Taxpayer required to file its annual report in order to be eligible for the preferential aerospace manufacturing B&O tax rate under RCW 82.04.260(11) and the B&O tax credit for qualified aerospace product development spending under RCW 82.04.4461?

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

<sup>2</sup> RCW 82.32.545 was repealed in 2010 and replaced by RCW 82.32.534, effective June 10, 2010. See note 14.

## FINDINGS OF FACT

[Taxpayer] is a business whose primary activity in Washington State is the manufacturing and wholesale sale of commercial airplane component parts. On December 23, 2013, Taxpayer asked the Department for a B&O tax refund for the difference between the wholesaling B&O tax rate Taxpayer paid for the year 2009 and the preferential aerospace manufacturing rate, which has been available since July 2007.<sup>3</sup> Taxpayer did not originally report income under the preferential aerospace B&O tax rate or claim the qualified aerospace product development spending B&O tax credit for the calendar year 2009.

On December 23, 2013, Taxpayer requested a refund based on its proposed adjustments to tax year 2009 reclassifying Taxpayer's business activities to the preferential aerospace business and occupation ("B&O") tax classification and allowing a qualified aerospace product development spending B&O tax credit to be applied to the period of January 1, 2009 through December 31, 2009.

On January 14, 2014, The Department denied Taxpayer's refund request on the basis that Taxpayer did not timely submit the required annual report for 2009 in order to qualify for the tax benefits, citing RCW 82.32.545, and stating that annual reports for tax year 2009 and prior were due by "March 31<sup>st</sup> following any year in which a preferential tax rate or credit was used."<sup>4</sup>

Taxpayer asked the Department to reconsider its denial of Taxpayer's refund request; the Department affirmed the denial in correspondence dated March 13, 2014, on the basis that Taxpayer did not timely file the annual report for 2009.<sup>5</sup> . . . Taxpayer timely filed a petition appealing the Department's denial of the refund request, and seeking clarification of the annual report due dates for the tax benefits and period in question.

For tax year 2009, Taxpayer did not use the preferential aerospace manufacturing B&O tax rate under RCW 82.04.260(11) and did not take the B&O tax credit for qualified aerospace product development spending under RCW 82.04.4461.<sup>6</sup> Department records indicate Taxpayer did not request an extension of the due dates to file annual reports for 2009. Taxpayer began its efforts to claim the aerospace tax benefits for 2009 in December 2013.<sup>7</sup>

## ANALYSIS

RCW 82.04.220 imposes the B&O tax "for the act or privilege of engaging in business activities" in Washington State. The tax is based on "value of products, gross proceeds of sale, or gross income of the business." *Id.*

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<sup>3</sup> A preferential rate has been available since October 1, 2005. Effective July 1, 2007, the preferential rate is 0.2904 percent. *See* RCW 82.04.260(11). Taxpayer paid a B&O wholesaling rate of 0.484 percent.

<sup>4</sup> Taxpayer Account Administration (TAA) correspondence to Taxpayer, dated January 14, 2014.

<sup>5</sup> TAA correspondence to Taxpayer, dated March 13, 2014.

<sup>6</sup> Letter from Taxpayer Representative to Department (December 19, 2013).

<sup>7</sup> *Id.*

RCW 82.04.240 imposes the B&O tax “[u]pon every person engaging within this state in business as a manufacturer . . .” at the rate of 0.484 percent. *Id.* Additionally, persons making wholesale sales in Washington are subject to wholesaling B&O tax on the gross proceeds of sales at the rate of 0.484 percent. RCW 82.04.270.<sup>8</sup> However, a preferential B&O tax rate of 0.2904 percent, effective July 1, 2007, is available for persons “making sales, at retail or wholesale, of commercial airplanes or components of such airplanes, manufactured by the seller.” RCW 82.04.260(11)(a)(ii). *Id.*<sup>9</sup>

During the relevant period, RCW 82.04.260(11)(d) (amended 2010) provided that to qualify for the preferential aerospace manufacturing rate, a taxpayer “must file a complete annual report<sup>10</sup> with the department under RCW 82.32.545.”<sup>11</sup> During the relevant period, RCW 82.04.4461 (amended 2010) provided that “a [B&O tax] credit is allowed for each person for qualified aerospace product development.”<sup>12</sup> Like the preferential B&O tax rate for aerospace manufacturing, “a person claiming the credit under this section must file a complete annual report with the department under RCW 82.32.545.”<sup>13</sup> RCW 82.04.4461(6) (amended 2010).

In reference to the annual report due date for both RCW 82.04.260 and RCW 82.04.4461 during the relevant period, RCW 82.32.545 (repealed 2010) stated, “The report is due by March 31st following any year in which a preferential tax rate under RCW 82.04.260(11) is used.” *Id.* (Emphasis added.)

Taxpayer argues that the annual reports for both RCW 82.04.260(11) and RCW 82.04.4461 were not due until March 31, 2014, on the basis that Taxpayer did not begin efforts to claim the

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<sup>8</sup> Persons engaging in multiple activities may be entitled to the Multiple Activities Tax Credit (MATC). RCW 82.04.440 provides as follows:

- (1) Every person engaged in activities which are within the purview of the provisions of two or more of sections RCW 82.04.230 to 82.04.290 [which includes manufacturing B&O tax], inclusive, shall be taxable under each paragraph applicable to the activities engaged in.
- (2) Persons taxable under RCW 82.04.250 [or] 82.04.270 [Retailing or Wholesaling B&O tax] . . . with respect to selling products in this state shall be allowed a credit against those taxes for any (a) manufacturing taxes paid with respect to the manufacturing of products so sold in this state, . . .

RCW 82.04.440; *see also* WAC 458-20-19301 (Rule 19301).

<sup>9</sup> [The preferential rate in RCW 82.04.260(11)(a) is also available to businesses that manufacture commercial airplanes or “components of such airplanes.” A business that qualifies for the preferential rate in RCW 82.04.260(11)(a) on its manufacturing and selling activities may be entitled to a multiple activities credit under RCW 82.04.440.]

<sup>10</sup> Because the issue in the present appeal is solely the annual report due date, we do not address the contents of annual reports or other requirements in our analysis and discussion here.

<sup>11</sup> RCW 82.32.545 was repealed upon enactment of RCW 82.32.534, effective June 10, 2010, *see* Laws of 2010, ch. 114, § 103. RCW 82.04.260(11)(d) was amended in 2010 to reflect this change. *See* Laws of 2010 1st sp.s., ch. 23 § 506, (refers to Laws of 2010, ch. 114 (SHB 3066), § 103.). RCW 82.04.260(11)(d) now refers to RCW 82.32.534 for annual report filing requirements. *Id.* In contrast to the repealed statute, RCW 82.32.534 now requires an annual report to be filed “following any calendar year in which a person becomes *eligible to claim the tax preference.*” *Id.* (Emphasis added).

<sup>12</sup> Like 82.32.260, RCW 82.04.4461(6) was amended in 2010 to replace the reference to RCW 82.32.545 with a reference to RCW 82.32.534. Laws of 2010, ch. 114, § 115. See note 14.

<sup>13</sup> RCW 82.32.545 was repealed in 2010. See note 14.

benefits until 2013. In support of this contention, Taxpayer refers to Rule 267, which the Department adopted in part to administer the annual report requirements for certain tax benefits. Taxpayer specifically cites language in Rule 267(3), in effect from October 22, 2006, through May 27, 2010,<sup>14</sup> that stated, “[f]or reports due in 2010 or earlier . . . the report must be filed or postmarked by March 31<sup>st</sup> following any calendar year in which the tax credit, tax exemption, or tax rate is claimed.” Rule 267(3)(e)(ii) (emphasis added). However, Taxpayer misconstrues the rule and the underlying statute. Rule 267(3) also stated,

- (b) **First Report.** The first report filed under this subsection must also include employment, wage, and benefit information for the 12-month period immediately before first use of a tax adjustment. In order to meet this requirement, a person must complete a report for the calendar year immediately preceding the first use of a tax adjustment.
- (c) **Due date.** The report must be filed by March 31<sup>st</sup> following any calendar year in which any tax adjustment is taken against taxes due.

(d) **Examples.**

- (i) An aerospace firm begins taking the B&O tax rate provided by RCW 82.04.260(11) for manufacturers and processors for hire of commercial airplanes and component parts on October 1, 2005. By March 31, 2006, the aerospace firm must provide two annual reports, one covering calendar year 2004 and another covering calendar year 2005. *If the aerospace firm continues to take the B&O tax rate provided by RCW 82.04.260(11) during calendar year 2006, a single annual report is due on March 31, 2007, covering calendar year 2006.*

Rule 267(3) (emphasis in italics added.) Thus, Rule 267 indicated that the annual report for each calendar year is due by March 31<sup>st</sup> of the immediately following year. This is supported by analysis of the underlying statute . . . .

Taxpayer further argues that its position is supported by the Board of Tax Appeals (Board) decision in *Surreal Software Incorporated v. DOR*, BTA Docket No. 70322 (2010). In Det. No. 13-0358, 33 WTD 171 (2014), we concluded that we will not follow the Board’s decision in *Surreal* with regard to other taxpayers claiming tax benefits under RCW 82.04.4452.

In Det. No. 13-0331, 33 WTD 368 (2014), published while this case was pending, we determined that the Board’s analysis in *Surreal Software* was not applicable to annual reports for 2008 and 2009 for claims under RCW 82.32.545. As we discussed in 33 WTD 368, the issue in *Surreal* was whether a taxpayer, pursuant to RCW 82.04.4452, qualified for a Research & Development (R&D) tax credit for the years 2004 and 2006.<sup>15</sup> Like the present case, to qualify for the tax

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<sup>14</sup> The Department amended Rule 267, effective October 6, 2014, during the pendency of this appeal filed on May 9, 2014. See WSR 14-19-018, § 458-20-267, filed 9/5/14, effective 10/6/14. The language in the version of the rule Taxpayer cites remains unchanged.

<sup>15</sup> We do not follow *Surreal* with regard to other taxpayers claiming tax benefits under RCW 82.32.4452. As we discuss in Det. No. 13-0358, 33 WTD 171 (2014),

benefit, the taxpayer was required to file an annual report by a certain due date. 33 WTD 368. The language of RCW 82.32.545 stated that the due date was “March 31<sup>st</sup> following any year *in which a preferential tax rate . . . is used.*” *Id.* (Emphasis in original.) Because the taxpayer in 33 WTD 368 “claimed” a B&O tax reclassification and refund after the fact, it did not meet the requirement of the statute that the preferential tax rate be “used” prior to the annual reporting due date. *Id.* We concluded that pursuant to RCW 82.32.545, in order for annual reports for calendar years 2008 and 2009 to be timely filed, they must be filed by March 31, 2009 and March 31, 2010, respectively. *Id.*

Because the tax benefits applicable to calendar year 2009 under both RCW 82.04.260(11) and RCW 82.04.4461 were governed by the annual reporting requirements set forth in RCW 82.32.545, it follows, consistent with the Department’s position set forth in 33 WTD 368 and 33 WTD 171, that the annual report due date for 2009 under both statutes was March 31, 2010. RCW 82.32.545; *see* 33 WTD 368; 33 WTD 171. *See also* 27 WTD 232 (discussion of the legislative intent underlying annual reports and their required due dates.)

Here, for tax year 2009, Taxpayer did not use the preferential aerospace manufacturing B&O tax rate available under RCW 82.04.260(11) and did not use the B&O tax credit for qualified aerospace product development spending available under RCW 82.04.4461. Moreover, Taxpayer did not file annual reports for either tax benefit on the due date for both, March 31, 2010, or any extension thereof. We conclude, therefore, that Taxpayer is not entitled to the tax benefits for tax year 2009 under RCW 82.04.260(11) or RCW 82.04.4461, and find that the Department properly denied Taxpayer’s refund request. Accordingly, we deny the petition.

#### DECISION AND DISPOSITION

Taxpayer’s petition for refund is denied.

Dated this 11th day of May, 2015.

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The Board’s reading of RCW 82.04.4452(6)(b) would have allowed taxpayers to file the survey the year following whenever they claimed the credit, and would have rendered the survey due date meaningless [contrary to principles of sound statutory construction]. . . . The Department will not apply the *Surreal* decision to other taxpayers claiming the high tech R&D credit. The Department will continue to follow Det. No. 08-0134, 27 WTD 232.

*Id.* In Det. No. 08-0134, 27 WTD 232, we discuss the legislature’s use of the information provided in taxpayers’ annual surveys, the equivalent of the annual report in the present case. With regard to timely filing and the legislative intent underlying the annual survey due date requirement, we stated,

It would simply not be consistent with the legislature’s stated intent to obtain timely and accurate information, to allow taxpayers to wait several years after the R&D spending was incurred, before filing the required annual surveys. The surveys contain essential information that needs to be transmitted to the legislature in a timely manner. Such a policy would undermine the accuracy of the information relied upon by the legislature and possibly frustrate its intent to make informed policy decisions.

*Id.*