

Cite as Det. No. 16-0210, 35 WTD 634 (2016)

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

In the Matter of the Petition for Correction of ) D E T E R M I N A T I O N  
Assessment of )  
 ) No. 16-0210  
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 )  
... ) Registration No. . . .  
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**RULE 268; RCW 82.04.590: B&O TAX – ANNUAL SURVEY – EXTENSION OF DUE DATE.** The Department may grant an extension of the due date of an annual survey (1) if the failure to timely file the survey was the result of circumstances beyond the taxpayer's control or (2) if requested in writing and, then, only if the taxpayer has timely filed all annual surveys due since 2010. The Department has no jurisdiction to grant an extension under the latter alternative beyond 90 days past the original survey due date.

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.

**Yonker, T.R.O.** – A former . . . manufacturer (Taxpayer) that claimed the Washington Customized Employment Training Credit (tax credit) on its combined excise tax returns, but then failed to file the required annual survey by the due date, protests the Department’s assessment of business and occupation (B&O) tax to recover the amount of the tax credit claimed. We deny Taxpayer’s petition.<sup>1</sup>

## ISSUE

Under RCW 82.32.590, is Taxpayer entitled to an extension of the due date to file the annual survey that is required under RCW 82.32.585?

## FINDINGS OF FACT

[Taxpayer]<sup>2</sup> was in the business of manufacturing . . . until 2015, when it ceased operations. In March 2015, Taxpayer went into receivership, at which point a receiver was appointed. In September 2015, Taxpayer closed its account with the Department.

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

<sup>2</sup> According to Department records, Taxpayer's name was " . . ." until the name was changed to its current name in July 2015.

Prior to 2015, Taxpayer regularly claimed the Washington Customized Employment Training Credit (tax credit) on its monthly combined excise tax returns and filed the required annual survey. For the 2014 tax year, Taxpayer again claimed the tax credit on most, but not all, of its monthly combined excise tax returns.<sup>3</sup>

On February 19, 2015, and again on April 2, 2015, the Department sent messages to Taxpayer via the Department's secure messaging electronic system reminding Taxpayer that the deadline was April 30, 2015, to file the required annual survey in order to avoid being assessed the B&O tax that Taxpayer had already been credited for the 2014 tax year. The required annual survey was never filed with the Department.

On December 10, 2015, the Department's Taxpayer Account Administration Division (TAA) issued a tax assessment against Taxpayer to collect the \$ . . . in B&O tax that Taxpayer had previously been credited for the 2014 tax year, and also assessing \$ . . . in interest.

On January 5, 2016, Taxpayer mailed its appeal petition of the tax assessment to the Appeals Division, where it was received on January 7, 2016.<sup>4</sup> On review, Taxpayer, through its receiver, made the following representations:

1. . .
2. The receiver was appointed on March 20, 2015.
3. Taxpayer's accounting staff, which were "responsible for the DOR tax returns, were let go and not retained" by the receiver.
4. The receiver was "never notified of the training survey requirement, even though [the receiver was] filing DOR reports on behalf of [Taxpayer] in 2015."

## ANALYSIS

Washington imposes a B&O tax "for the act or privilege of engaging in business" in Washington. RCW 82.04.220. There is no dispute that Taxpayer's business activity was subject to B&O tax. However, Taxpayer argues that it should not be liable for any additional B&O tax for the 2014 tax year beyond that which it originally reported and paid for that year, and that the additional B&O tax assessed by the Department represents the amount of the tax credit that Taxpayer is eligible to claim for 2014 under RCW 82.04.449.

RCW 82.04.449(1) states that when computing B&O tax,

[A] credit is allowed for participants in the Washington customized employment training program created in RCW 28B.67.020. The credit allowed under this section is equal to fifty percent of the value of a participant's payments to the employment training finance account created in RCW 28B.67.030.

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<sup>3</sup> Taxpayer did not claim the tax credit on the following monthly combined excise tax returns: January 2014, February 2014, November 2014, and December 2014.

<sup>4</sup> Since the time Taxpayer filed its appeal, the Appeals Division has been renamed the Administrative Review and Hearings Division.

The parties do not dispute that Taxpayer generally qualified for the tax credit based on the language of this subsection. However, RCW 82.04.449(2) imposes an additional requirement on a taxpayer who claims the tax credit: “[a] person claiming the credit provided in this section must file a complete annual survey with the department under RCW 82.32.585.”

RCW 82.32.585, in turn, provides as follows:

(1)(a) Every person claiming a tax preference that requires a survey under this section must file a complete annual survey with the department.

(i) . . . [T]he survey must be filed by April 30<sup>th</sup> of the calendar year following the calendar year in which the person becomes eligible to claim the tax preference that requires a survey under this section.

. . .

(6)(a) Except as otherwise provided by law, if a person claims a tax preference that requires an annual survey under this section but fails to submit a complete annual survey by the due date of the survey or any extension under RCW 82.32.590, the department must declare the amount of the tax preference claimed for the previous calendar year to be immediately due. . . .

Here, Taxpayer concedes that it did not file the required survey for the tax credit amount Taxpayer claimed during the 2014 tax year before the deadline on April 30, 2015. However, Taxpayer argues that following the appointment of a receiver in March 2015 to manage Taxpayer’s business affairs, the receiver was not aware of the requirement to file the required survey by April 30, 2015. Because of this circumstance, Taxpayer now requests “the opportunity to file the annual survey.” We interpret Taxpayer’s argument to be a request for extension of the due date for filing the required survey.

RCW 82.04.590 provides two different situations in which the Department has authority to grant extensions of the required survey. First, RCW 82.04.590(1) allows for an extension of thirty days when a taxpayer’s failure to file the required survey “was the result of circumstances beyond the control of the taxpayer.” RCW 82.04.590(2) further states the following:

In making a determination whether the failure of a taxpayer to file an annual survey or annual report by the due date was the result of circumstances beyond the control of the taxpayer, the department must be guided by rules adopted by the department for the waiver or cancellation of penalties when the underpayment or untimely payment of any tax was due to circumstances beyond the control of the taxpayer.

WAC 458-20-268(11)(c), the Department’s administrative rule related to RCW 82.04.590, states that determining whether a circumstance was beyond the control of a taxpayer is determined based on the provisions of WAC 458-20-228 (Rule 228), which addresses waiver or cancellation of penalties.

Rule 228(9)(a)(ii) defines “circumstances beyond the control of the taxpayer” as circumstances that are “immediate, unexpected, or in the nature of an emergency” and that “result in the taxpayer not having reasonable time or opportunity to obtain an extension of the due date or otherwise timely file and pay.” Here, Taxpayer’s apparent argument is that it entered into receivership in March 2015 and the receiver did not know of the requirement to file the annual survey by April 30, 2015.

Rule 228(9)(a)(iii) provides specific examples of circumstances that are “generally not considered to be beyond the control of the taxpayer.” Rule 228(9)(a)(iii)(B) states that a misunderstanding or lack of knowledge of a tax liability is generally not considered a circumstance beyond the control of a taxpayer. Consistent with this statement, we have specifically held that lack of knowledge “is not a ‘circumstance beyond the control of the taxpayer’ because the law, regulations, and Department publications explaining all tax laws are publicly available not only to taxpayers, but to the tax professionals who support them.” Det. No. 01-096, 22 WTD 126 (2003).

While we understand that the receiver did not retain Taxpayer’s original accounting staff, which presumably would have known of the survey deadline, we conclude that the receiver had access to Taxpayer’s records, and the relevant tax laws and regulations. In addition, the Department at least twice, in February 2015, and again in early April 2015, notified Taxpayer of the approaching due date. Therefore, we conclude that the appointment and subsequent actions of the receiver do not constitute circumstances beyond the control of Taxpayer under Rule 228(9)(a). As such, Taxpayer does not qualify for an extension of the due date for filing the annual survey under RCW 82.32.590(1).

RCW 82.32.590(3), the other situation in which the Department has authority to grant an extension for the due date of the annual survey, states the following:

- (a) Subject to the conditions in this subsection (3), a taxpayer who fails to file an annual report or annual survey required under subsection (1) of this section by the due date of the report or survey is entitled to an extension of the due date. A request for an extension under this subsection (3) must be made in writing to the department.
- (b) To qualify for an extension under this subsection (3), a taxpayer must have filed all annual reports and surveys, if any, due in prior years under subsection (1) of this section by their respective due dates, beginning with annual reports and surveys due in calendar year 2010.
- (c) An extension under this subsection (3) is for ninety days from the original due date of the annual report or survey.
- (d) No taxpayer may be granted more than one ninety-day extension under this subsection (3).

We conclude that we have no authority to grant any extension to Taxpayer related to the annual survey due on April 30, 2015, because an extension to that deadline under RCW 82.32.590(3)

would have been available only up to ninety days after that date, or until no later than July 31, 2015. Thus, we cannot grant any extension beyond that date, which has long since passed.

Because Taxpayer has failed to satisfy the requirements for receiving an extension of the due date for filing the annual survey, pursuant to RCW 82.32.585(6)(a), the Department “must” assess Taxpayer for the amount of the tax credit it claimed for 2014. Thus, we affirm the tax assessment as issued.<sup>5</sup>

#### DECISION AND DISPOSITION

Taxpayer’s petition is denied.

Dated this 22nd day of June, 2016.

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<sup>5</sup> While Taxpayer did not address this in its petition, we note that effective July 1, 2016, RCW 82.32.585(6)(a) will be amended to impose only 35 percent of the amount of the tax preference claimed for “amounts due and payable . . . on or after July 1, 2017.” We further note that this change applies retroactively only “for a taxpayer who has filed an appeal regarding taxes, penalties, and interest owed under [RCW 82.32.585] before January 1, 2016,” and that appeal is pending before us as of July 1, 2016. We conclude that Taxpayer cannot qualify for retroactive application of this statutory change because it did not file its appeal petition until January 5, 2016.