

Cite as Det. No. 13-0383, 33 WTD 178 (2014)

BEFORE THE APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition for Reversal of) DETERMINATION
Letter Ruling)
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 No. 13-0383
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... Registration No.
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[1] RULE 268; RCW 82.04.4452, RCW 82.32.585, RCW 82.32.590: BUSINESS AND OCCUPATION TAX – TAX CREDIT FOR QUALIFIED RESEARCH AND DEVELOPMENT SPENDING – ANNUAL SURVEY REQUIREMENT – CRITERIA FOR EXTENSION OF THE FILING DEADLINE. Taxpayer failed to timely file with the Department the annual survey required to qualify for a research and development (R&D) spending business and occupation (B&O) tax credit. In addition, Taxpayer's circumstances did not meet the criteria for extension of the filing deadline. Therefore, the Department properly denied Taxpayer's request to claim the B&O tax credit for qualified R&D spending.

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.

Valentine, A.L.J. – [Taxpayer] petitions for reversal of a Letter Ruling, issued by the Department of Revenue's (Department) Taxpayer Account Administration (TAA) division, notifying Taxpayer that it does not qualify for a 2011 high technology business and occupation (B&O) tax credit for research and development (R&D) spending because the required annual survey was not timely filed. We conclude TAA's ruling is correct. Taxpayer's petition is denied.¹

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

ISSUE

Pursuant to RCW 82.04.4452, RCW 82.32.585, RCW 82.32.590, and WAC 458-20-268 (Rule 268), does Taxpayer qualify for a B&O tax credit for qualified 2011 R&D spending when Taxpayer did not submit the required annual survey by April 30, 2012?

FINDINGS OF FACT

Taxpayer is a Washington corporation engaged in the development of . . . technology. On October 3, 2012, Taxpayer submitted a Letter Ruling Request to TAA. Taxpayer informed TAA that it was previously unaware of the availability of the B&O tax credit for qualified R&D spending and wished to amend its 2008, 2010, and 2011 tax returns to claim the credit. TAA informed Taxpayer that it could not claim the credit for 2011 because it had not timely filed the required annual survey. Taxpayer appealed TAA's letter ruling applicable to tax year 2011.

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.*

RCW 82.04.4452 authorizes a B&O tax credit for qualified R&D spending.² To claim the credit, a person “must file a complete annual survey with the department under RCW 82.32.585.” RCW 82.04.4452(6). The Washington Legislature enacted RCW 82.32.585, effective June 10, 2010.³ The statute requires that the annual survey be filed “by April 30th of the year *following any calendar year in which a person becomes eligible to claim the tax preference* that requires a survey under this section”⁴ RCW 82.32.585(1)(a)(i). The survey must include information about “qualified research and development expenditures *during the calendar year for which the credit was claimed.*” RCW 82.32.585(2)(c). The provisions of RCW 82.32.585 “apply beginning with annual surveys and annual reports *due in 2011 and thereafter.*” Laws of 2010, ch. 114, § 203 (emphasis added.)

Rule 268 is the Department’s rule for implementing the annual survey requirement. It reiterates the statutory requirements as follows:

(2) **Who is required to file the annual survey?** The following persons must file a complete annual survey:

² Because the issue in this appeal is limited to whether Taxpayer is entitled to the credit on the basis of the annual survey requirement, we conclude it unnecessary to discuss what encompasses “qualified R&D spending.”

³ Laws of 2010, ch. 114, § 102.

⁴ We find it unnecessary to analyze or discuss the required contents of an annual survey because the issue in the present appeal is the due date.

- (a) A person claiming the business and occupation (“B&O”) tax credit provided by RCW 82.04.4452 for engaging in qualified research and development.

(3) How to file annual surveys.

(d) Due date.

- (i) **For surveys due in 2011 or later.** For persons claiming any B&O tax credit, tax exemption, or tax rate listed under subsection (2) of this section, the survey must be filed or postmarked by April 30th following any calendar year in which the person becomes eligible to claim the tax credit, tax exemption, or tax rate.

(f) Examples.

- (i) Advanced Computing, Inc. qualifies for the B&O tax credit provided by RCW 82.04.4452 and applied it against taxes due in calendar year 2010. Advanced Computing, Inc. filed an annual survey in March 2010 for credit claimed under RCW 82.04.4452 in 2009. Advanced Computing, Inc. must electronically file an annual survey with the department by April 30, 2011.

RCW 82.32.590 provides two exceptions to the filing deadline. RCW 82.32.590(1) specifies that the Department “must extend the time for filing the survey or report” if the failure to file an annual survey by the due date was the result of “circumstances beyond the control of the taxpayer.” If granted, the extension is for 30 days from the date the Department issues written notification to the taxpayer of the approval of an extension. *Id.* RCW 82.32.590(2) explains that the Department must follow the same Department rules for the late submission of an annual survey as for cases involving waiver or cancellation of penalties due to circumstances beyond the control of the taxpayer.⁵ RCW 82.32.590(1) applies to annual surveys and reports due in calendar year 2011 and thereafter.⁶

WAC 458-20-228 (Rule 228) explains what constitutes “circumstances beyond the control of the taxpayer” in a penalty waiver or cancellation case. Rule 228(9)(a)(ii) provides, “Circumstances beyond the control of the taxpayer are generally those which are immediate, unexpected, or in the nature of an emergency. Such circumstances result in the taxpayer not having reasonable time or opportunity to obtain an extension of the due date or otherwise timely file and pay.” The burden is on the taxpayer to establish that “the circumstances were beyond its control and directly caused the late payment.” Rule 228(9)(a)(i).

Rule 228(9)(a)(ii) lists examples of situations that are beyond a taxpayer’s control sufficient to cancel penalties, including, but not limited to:

⁵ See also Rule 268.

⁶ Laws of 2010, ch. 137 § 2.

- Erroneous written information from the Department;
- An act of fraud or conversion by the taxpayer's employee or contract helper which the taxpayer could not immediately detect or prevent;
- Emergency circumstances around the time of the due date, such as the death or serious illness of the taxpayer or a family member or accountant; or
- Destruction of the business or records by fire or other casualty.

Rule 228(9)(a)(iii) lists examples of situations that are generally not considered beyond the control of the taxpayer, including, but not limited to:

- Financial hardship; or
- A misunderstanding or lack of knowledge of the tax liability; or
- Mistakes or misconduct on the part of employees or other persons that the taxpayer contracted with.

Thus, Taxpayer's lack of knowledge about the B&O tax credit for qualified R&D expenditures and the annual survey requirement does not constitute circumstances beyond Taxpayer's control.

RCW 82.32.590(3) directs that a taxpayer who fails to file an annual survey or report by the due date is entitled to a one-time 90-day extension of the deadline. The 90-day extension is from the original due date of the survey or report. *Id.* The request for an extension must be made in writing to the Department, and the taxpayer must have filed all annual surveys or reports due in prior years by the due date, beginning with annual surveys and reports due in calendar year 2010. *Id.* Taxpayer did not submit a written request to the Department asking for a 90-day extension of the survey filing deadline.

RCW 82.32.585(6)(a) explains the penalty for claiming a tax preference that requires an annual survey but failing to submit a complete survey by the due date:

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.

The penalty for claiming the credit, but not timely submitting a complete annual survey, is the requirement that the amount claimed for the previous calendar year is immediately due. The Legislature's enactment of RCW 82.32.585(6)(a), providing for the penalty on an annual basis,

makes clear that the credit was not available retroactively as of the effective date of the statute (June 10, 2010).

Taxpayer contends that RCW 82.32.585(2)(f) provides support for its request to amend its 2011 state excise tax return to allow the B&O tax credit for qualified R&D spending. It reads, in pertinent part:

If the person filing a survey under this section did not file a survey with the department in the previous calendar year, the survey filed under this section must also include the employment, wage, and benefit information required under (b)(i) through (iv) of this subsection for the calendar year immediately preceding the calendar year for which a tax preference was claimed.

Taxpayer asserts that the language of section (2)(f) means that, since it did not file a survey for tax year 2010, it need only file a survey including the required information for tax years 2010 and 2011 in order to claim the credit for tax year 2011.

The Department disagrees with Taxpayer's interpretation of RCW 82.32.585(2)(f). We note the following language of section (2)(f): "the survey filed under this section *must also include . . .*" (Emphasis added.) The Department concludes that RCW 82.32.585(2)(f), when analyzed within the context of the statute as a whole, simply imposes the requirement that a first-time survey filer, or a taxpayer who did not claim the credit for the previous year, include the necessary employment, wage, and benefit information for both the tax year of the claimed credit and of the prior tax year. This section of the statute makes no reference to the deadline for filing an annual survey.

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In summary, RCW 82.32.585, which was effective June 10, 2010, requires the annual survey at issue be filed by April 30th of the year following the calendar year in which a person becomes eligible to claim the tax preference. RCW 82.32.585 applies to surveys due in 2011 and thereafter. The calendar year at issue in this case is 2011, the year in which the R&D spending at issue was incurred. Thus, by statute, to claim the B&O tax credit for qualified 2011 R&D expenditures, Taxpayer must have filed its annual survey by April 30, 2012. It did not. Nor does Taxpayer qualify for either exception to the survey deadline as outlined in RCW 82.32.590. Thus, Taxpayer's petition is denied.

DECISION AND DISPOSITION

Taxpayer's petition is denied.

Dated this 10th day of December 2013.