

Cite as Det. No. 18-0021, 38 WTD 087 (2019)

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

In the Matter of the Petition for ) D E T E R M I N A T I O N  
Correction of Assessment of )  
                                    )  
                                    )  
                                    No. 18-0021  
                                    )  
                                    )  
...                               ) Registration No. . . .  
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[1] RCW 82.04.067; RCW 82.04.460; RCW 82.04.462; WAC 458-20-19402: APPORTIONMENT - RECEIPTS FACTOR - THROW-OUT INCOME. Apportionable income must be excluded from the denominator of the receipts factor if at least some of the activity is performed in Washington, and the income is attributable to a state in which the taxpayer is not taxable.

[2] RCW 82.32.105; WAC 458-20-228: PENALTIES - WAIVER - CIRCUMSTANCE BEYOND CONTROL. A lack of knowledge of a tax liability does not constitute a circumstance beyond the control of the taxpayer.

[3] RCW 82.32.160; WAC 458-20-100: RECOVERY OF COSTS - ATTORNEY FEES. Washington law does not provide for the recovery of costs which the taxpayer incurred from representation during the administrative review of the taxpayer's petition for a correction to an assessment.

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.

Poley, T.R.O. – An internet-based company that matches music teachers and potential students within and outside Washington disputes the Department of Revenue's (Department) calculation of "throw-out" income when apportioning its income for Business & Occupation (B&O) tax purposes. Taxpayer also requests attorney's fees, claiming it was required to hire counsel in order to resolve its dispute with the Department. The petition is granted in part, denied in part, and remanded for adjustment.<sup>1</sup>

## ISSUES

1. Did an internet matching service [business] have substantial nexus in other states under RCW 82.04.067 and WAC 458-20-19401, affecting the calculation of its receipts factor pursuant to RCW 82.04.460, RCW 82.04.462, and WAC 458-20-19402?

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

2. Is an internet matching service [business] eligible for waiver of penalties under RCW 82.32.105 and WAC 458-20-228?
3. May an internet matching service [business], seeking administrative review of an assessment, recover attorney's fees if its petition for correction of an assessment under RCW 82.32.160 is granted?

#### FINDINGS OF FACT

. . . (Taxpayer) is an [out-of-state] corporation that was formed in 2008. When Taxpayer incorporated, its two corporate officers, spouses . . . (Officers),<sup>2</sup> resided [out-of-state]. In 2010, however, Officers moved to Washington. At that time, Taxpayer obtained a foreign corporation registration with the Washington Secretary of State, a certificate of business license registration with the Department of Revenue (Department), and an excise tax reporting account with the Department. Taxpayer has used a private mailbox in . . . , Washington as its mailing address since before July 2010. Taxpayer does not own any real property in Washington and has not reported any employees in Washington in the last six years.

Taxpayer operates an online network of music teachers (Instructors) in 26 states, including Washington, offering music lessons to children in their homes. Parents desiring music lessons for their children (Students) use Taxpayer's website to request lessons, specifying the instrument, location, and availability. Using software on its website, Taxpayer matches a Student with an Instructor that teaches the requested instrument in the Student's geographic location with corresponding availability. The Student uses Taxpayer's website to pay for lessons, either in a prepaid block, or by scheduling an automatic monthly payment for the number of lessons actually taught in the preceding month. The price of lessons depends on the length of the lesson and the Student's geographic location. Instructors are paid a predetermined amount per lesson as an independent contractor.

All Instructors must sign a standard contract (Contract) with Taxpayer prior to teaching music lessons to Students. The Contract states [that Taxpayer schedules the music lessons] . . . If a Student does not want to be taught by the assigned Instructor, Taxpayer is permitted to remove that Student from the Instructor. According to the Contract, Instructors are required to use Taxpayer's website to summarize all lessons taught and must submit a monthly time card with a Student's signature in order to verify the lesson was taught. Taxpayer pays Instructors on a monthly basis for the number of lessons reported and verified. If a time card is not submitted timely, Taxpayer will deduct a fee from the Instructor's next payment. If an Instructor misses a scheduled lesson, Taxpayer will deduct a fee from the Instructor's pay unless the Instructor provides documentation showing an approved reason for missing the lesson, such as inclement weather. Taxpayer will provide each Instructor with an IRS Form 1099 each year showing the amount Taxpayer paid to the Instructor.

Taxpayer's website has a contact page with a feedback form, asking customers to use the form to send a testimonial or question. The page states that Taxpayer will respond via email or phone as soon as possible. The contact page also provides Taxpayer's mailing address in . . . , Washington, and a toll-free phone number to call. . . .

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<sup>2</sup> Officers later divorced in 2014.

The Department's Audit Division (Audit) examined Taxpayer's books and records for the period January 2012 through December 2013 (the Audit Period). During the Audit Period, Taxpayer reported its revenues to the Department under the service and other activities B&O tax classification. Taxpayer claimed an interstate and foreign sales deduction of over 96 percent of its income in 2012, and 100 percent of its income in 2013. Audit disallowed the deductions because it found that Taxpayer had not properly apportioned its income. Audit also discovered that Taxpayer had not timely filed an annual apportionment reconciliation of income (Reconciliation) for either year included in the Audit Period.

In order to determine Taxpayer's tax liability, Audit calculated Taxpayer's "receipts factor."<sup>3</sup> First, Audit attributed Taxpayer's receipts to the state where each music lesson occurred. Taxpayer did not have more than \$250,000 of receipts, more than \$50,000 of property or payroll, or at least 25 percent of its total property or total payroll in any jurisdiction. Then, Audit determined Taxpayer's throw-out income. Audit found that each out-of-state activity was, in part, performed in Washington. Audit concluded that all of Taxpayer's out-of-state apportionable income was throw-out income.

Next, Audit divided Taxpayer's Washington attributable receipts by its world-wide receipts less throw-out income to obtain Taxpayer's receipts factor. Finally, Audit multiplied Taxpayer's receipts factor by its total apportionable income to determine the amount of Taxpayer's income subject to B&O tax in Washington.

On January 4, 2016, the Department issued a tax assessment (Assessment) against Taxpayer for \$ . . . , which included \$ . . . in B&O tax, \$ . . . in use tax, \$ . . . in interest, \$ . . . in delinquent payment penalty, and \$ . . . in assessment penalty.

Taxpayer requested further instructions from Audit regarding how to report its income in the future. Audit responded by email that Taxpayer is required to file a Reconciliation by October 31 of the following year, and provided a link to the form. Taxpayer filed Reconciliations for the 2012 through 2015 tax years.<sup>4</sup> The Department's Taxpayer Account Administration Division (TAA) verified that Audit had already reconciled Taxpayer's income for 2012 and 2013 in the Assessment. TAA then applied Audit's methodology to the information provided in Taxpayer's 2014 and 2015 Reconciliations. Finding additional tax due in both 2014 and 2015, TAA issued two balance due notices on February 18, 2016.

The first balance due notice (2014 Notice) was for \$ . . . , which included \$ . . . in B&O tax and \$ . . . in delinquent payment penalty at the 29 percent rate. The second balance due notice (2015 Notice) was for \$ . . . , which included \$ . . . in B&O tax and \$ . . . in delinquent payment penalty at the nine percent rate.

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<sup>3</sup> The receipts factor is a fraction that applies to apportionable income for each calendar year. WAC 458-20-19402(401). The receipts factor is calculated by dividing Washington attributed apportionable receipts by world-wide apportionable receipts after throw-out income has been subtracted from the world-wide apportionable receipts. WAC 458-20-19402(402).

<sup>4</sup> Taxpayer also filed a Reconciliation for 2011, but the Department ignored this filing as it was beyond the timeframe specified in RCW 82.32.050(4) and RCW 82.32.060(1) for correcting an assessment or issuing a refund.

Taxpayer timely requested administrative review of the Assessment, the 2014 Notice, and the 2015 Notice (together, Invoices). Taxpayer claims that income sourced to states other than Washington was incorrectly designated as throw-out income in calculating the receipts factor of the apportionment formula. Taxpayer asserts it is taxable in all states where Instructors taught music lessons, and therefore income from those locations is not throw-out income. Taxpayer acknowledges that it did not pay taxes to any other jurisdictions outside of Washington. However, Taxpayer maintains that it is not required to actually pay tax to an outside jurisdiction in order to be found taxable in that jurisdiction. Taxpayer provided a list of the 26 states where Instructors teach lessons and a brief explanation of the corporate tax administered by each state.

Additionally, Taxpayer argues that, for music lessons taught outside of Washington, no part of the income-generating activity is performed in Washington. Taxpayer claims that their entire business model is automated, requiring no involvement from Officers. Taxpayer provided evidence that its payment processor is based in [out-of-state]; its bank . . . is headquartered [out-of-state]; and its dedicated web hosting server is housed in [an out-of-state] data center. Taxpayer provided evidence that it uses an [out-of-state] company to run background checks on Instructors and can view an Instructor's completed background check report through the vendor's website. Taxpayer stated [an out-of-state] accountant completes and mails out IRS Form 1099 to each Instructor. Taxpayer claimed it used an internet freelance company 30 times since 2009 to hire contractors to create, develop, maintain, and fix its website. Taxpayer stated it contracted with [out-of-country] company to update its website in 2012.

To show that its electronic fax provider . . . is based [out-of-state], Taxpayer provided several screenshots of a sample electronic fax from an Instructor. Taxpayer's documents show an email with a two-page attachment from [its electronic fax provider] to Taxpayer's corporate officer. The opened attachment appears to be a fax cover sheet from a [print services] store and a handwritten lesson log. The cover sheet indicates it is from an Instructor and the comments section states, "February time card." The lesson log has Taxpayer's logo at the top and columns to place a Student's name, date of lesson, lesson length, and a signature.

Taxpayer also provided screenshots of the administrator view of its website. In this view, a website administrator can see attributes submitted by a Student, modify those attributes, view a Student's billing history, set new billing rates, approve lessons submitted by an Instructor, and track Instructor absences. Finally, Taxpayer provided a screenshot of its bank website, where Taxpayer can schedule monthly payroll payments by selecting Instructors from a list to pay through direct deposit.

Taxpayer also protests the delinquent payment penalties assessed in the Invoices. Taxpayer claims it did not know of the requirement to file a Reconciliation annually, as the instructions accompanying its annual paper return did not reference the Reconciliation, but filed Reconciliations immediately upon learning of the requirement. Finally, Taxpayer claims that it paid \$ . . . to its representative between 2014 and 2016 in order to navigate the audit process and defend against the Invoices. Taxpayer seeks compensation for these attorney's fees.

## ANALYSIS

### 1. Calculation of throw-out income

Any business earning apportionable income that is both taxable in Washington and “taxable in another state” must apportion its income. RCW 82.04.460(1). “Apportionable income” includes income earned from engaging [“apportionable activities,” which include activities subject to tax under RCW 82.04.290(2), the tax classification that applies to Taxpayer]. RCW 82.04.460(4)(a)(vi). Income is apportioned to Washington by multiplying a business’s apportionable income by a receipts factor each tax year. RCW 82.04.462(1); WAC 458-20-19402(401). The numerator of the receipts factor is the business’s gross annual income attributable to Washington State, and the denominator is the business’s gross annual income received worldwide from that activity less throw-out income. RCW 82.04.462(3)(a); WAC 458-20-19402(402).

Taxpayer and Audit agree that Taxpayer’s receipts are attributable to the location of the corresponding music lesson. Taxpayer’s dispute is with Audit’s determination that income attributed to states other than Washington is throw-out income.

Throw-out income is described in RCW 82.04.462(3)(c), which states that apportionable income must be excluded from the denominator of the receipts factor if at least some of the activity is performed in Washington, and the income is attributable to a state in which the taxpayer is “not taxable.” *See also* WAC 458-20-19402(403). The phrase “not taxable” means that the taxpayer “is not subject to a business activities tax by that state, except that a taxpayer is taxable in a state in which it would be deemed to have a substantial nexus with that state under the standards in RCW 82.04.067(1) regardless of whether that state imposes such a tax.” *Id.*

Under RCW 82.04.067(1), a business is deemed to have substantial nexus with this state if the person is:

- (a) An individual and is a resident or domiciliary of this state;
- (b) A business entity and is organized or commercially domiciled in this state; or
- (c) A nonresident individual or a business entity that is organized or commercially domiciled outside this state, and in the immediately preceding tax year the person had:
  - (i) More than fifty thousand dollars of property in this state;
  - (ii) More than fifty thousand dollars of payroll in this state;
  - (iii) More than two hundred fifty thousand dollars of receipts from this state; or
  - (iv) At least twenty-five percent of the person's total property, total payroll, or total receipts in this state.

Under these authorities, businesses [with apportionable income subject to Washington’s B&O tax] are only entitled to apportion their income . . . when they are “taxable in another state” during that year. To be “taxable in another state” means they are either subject to a business activities tax in another state [under established constitutional nexus standards], have substantial nexus in another state using Washington’s [minimum nexus statutory] thresholds, or are formed under the laws or

domiciled in another state. WAC 458-20-19402(106)(h)(i). [See generally, Det. No. 87-183, 3 WTD 195 (1987) (explaining that Taxpayers have a right to apportionment under the dormant Commerce Clause if their business activities face a risk of multiple state taxation).]

In this case, Taxpayer is domiciled in Washington and incorporated under the laws of [another state]. Under RCW 82.04.462(3)(c), Taxpayer is taxable in Washington and [the other state]. Income attributed to Washington or [the other state] is not throw-out income. Audit incorrectly designated [the other state] income as throw-out income, which was error. Therefore, we grant Taxpayer's petition as to income attributed to [the other state].

As to the remaining states where Taxpayer attributed income, Taxpayer does not meet the economic thresholds for substantial nexus listed in RCW 82.04.067(1)(c) in these states. Taxpayer is not taxable in these states unless it can show it is subject to a business activities tax in a particular state [based on established constitutional standards].

Taxpayer asserts it is taxable in every foreign state where it attributed income because each state administers some type of business activities tax. The existence of a business activities tax in a foreign state, however, does not mean that Taxpayer is subject to that tax. Taxpayer's calculation of its receipts factor must be based on more than unsubstantiated assertions; some evidence must support Taxpayer's claim that it is taxable in a particular state.

Taxpayer is correct that it need not pay tax to a foreign state to be subject to tax in that state, although payment would be evidence that Taxpayer was so taxable. A letter ruling or similar document from a foreign jurisdiction stating that Taxpayer is subject to a business activities tax in that state would also qualify. [As would evidence showing the Taxpayer performed business activity in the foreign jurisdiction, either directly or through independent representative, designed to help establish or maintain its market in that foreign jurisdiction. See *Lamtec Corp. v. Dep't of Revenue*, 170 Wn.2d 838, 849-50, 246 P.3d 788 (2011) (minimum nexus can be established when activities performed "on behalf of the taxpayer as significantly associated with the taxpayer's ability to establish and maintain a market in [the] state for sales") (quoting *Tyler Pipe Indus., Inc. v. Dep't of Revenue*, 486 U.S. 232, 107 S. Ct. 2810, 97 L. Ed. 2d 199 (1987)).] But merely listing the type of tax a state administers is not evidence that Taxpayer is capable of being taxed in a state. [Moreover,] Taxpayer has not shown it is taxable in a foreign state [under established dormant Commerce Clause nexus standards]. Accordingly, [we conclude that] Taxpayer is not taxable in any state other than Washington and [one other state].

Taxpayer also claims that even if it was not taxable in other jurisdictions, its business model is entirely automated, leaving no income-generating activity to be performed in Washington, and thus none of Taxpayer's income would qualify as throw-out income under RCW 82.04.462(3)(c). We find Taxpayer's argument unconvincing.

Taxpayer provided multiple records demonstrating how it managed its business from Washington. Taxpayer's screenshot of its bank website showed how Taxpayer's corporate officers would select which Instructors to pay, how much to pay them, and schedule payments through a direct deposit method. Similarly, while Taxpayer maintains that [an out-of-state] accountant prepares and mails IRS Form 1099 to each Instructor, Officers would gather that information for the accountant in Washington. Taxpayer's review of the background check report and approval of an Instructor takes place in Washington by Officers. Taxpayer's website invites Students and Instructors to

communicate with Taxpayer by calling a toll-free phone number or writing to its Washington address. Any response to such communication would be by Officers, an activity that takes place in Washington. The numerous testimonials displayed on Taxpayer's website under the heading "Recent Student Feedback" indicate that Taxpayer has received multiple communications in this manner.

According to the Contract, Taxpayer can change a Student's Instructor upon request. Screenshots of Taxpayer's website shows the ability to modify a Student's online profile and approve lessons submitted by an Instructor. The sample electronic fax provided by Taxpayer is evidence that Taxpayer's corporate officer receives some time cards by email, not through its website. To verify the lessons on the time card with lessons listed on Taxpayer's website, Taxpayer would have to approve the lessons manually. This is not automation, as Taxpayer claims. The evidence shows that Taxpayer's Officers actively manage the business, an activity that takes place in Washington.

Accordingly, we find that Taxpayer engaged in at least some activity in Washington when earning apportionable income from Instructors teaching music lessons to Students. As discussed above, Taxpayer is not taxable in states where Instructors taught lessons other than Washington and [one other state]. Therefore, Taxpayer's apportionable income from all states other than Washington and [the other state] was properly designated as throw-out income pursuant to RCW 82.04.462(3)(c). We deny Taxpayer's petition with respect to this issue.

## 2. Waiver of penalties

Taxpayers have certain rights and responsibilities under the law, including the responsibility to file accurate returns and pay taxes in a timely manner. RCW 82.32A.030. The Department shall assess against a taxpayer any tax that has been paid less than is properly due. RCW 82.32.050(1).

The Department operates under a progressive delinquent penalty scheme, outlined in RCW 82.32.090(1):

If payment of any tax due on a return to be filed by a taxpayer is not received by the department of revenue by the due date, there is assessed a penalty of nine percent of the amount of the tax; and if the tax is not received on or before the last day of the month following the due date, there is assessed a total penalty of nineteen percent of the amount of the tax under this subsection; and if the tax is not received on or before the last day of the second month following the due date, there is assessed a total penalty of twenty-nine percent of the amount of the tax under this subsection.

A taxpayer that does not timely file and pay its annual Reconciliation is subject to the delinquent payment penalty in RCW 82.32.090(1). RCW 82.04.462(4). To avoid the penalty, a taxpayer that has apportionable income from "apportionable activities" must correct the reporting for the current tax year when the complete information is available, but not later than October 31 of the following tax year. *Id.* "Apportionable activities" specifically include those taxed under the service and other activities B&O tax classification. RCW 82.04.290; RCW 82.04.460(4)(a)(vi).

Here, Taxpayer's activity is providing music lessons to Students and teaching opportunities for Instructors. Thus, it was required to file the Reconciliation and pay the additional tax due by

October 31 of the following year. Taxpayer did not file its 2012 through 2014 Reconciliations by the last day of the second month following the due dates. Therefore, Audit was required to assess the 29 percent delinquent payment penalty on the amount of tax due for 2012 and 2013 in the Assessment. TAA was also required to assess the 29 percent delinquent payment penalty on the amount of tax due in the 2014 Notice.

Taxpayer filed its 2015 Reconciliation in January 2016. Under RCW 82.04.462(4), the delinquent penalty will apply to additional tax due only if the 2015 reported figures are not corrected and the additional tax is not paid by October 31, 2016. The 2015 Reconciliation Taxpayer filed did not properly correct Taxpayer's reported figures, as Audit had directed Taxpayer to do in its future reporting instructions included in the Assessment. TAA acted properly when it applied Audit's methodology to the information provided in the 2015 Reconciliation and billed Taxpayer for the additional tax due. However, Taxpayer is not subject to the delinquent penalty unless it does not pay the additional tax due by October 31, 2016. TAA acted prematurely when it included a nine percent delinquent penalty in the 2015 Notice. We grant Taxpayer's petition with respect to the delinquent penalty in the 2015 Notice, with caution to Taxpayer that it *will* be subject to the delinquent penalty if the tax due in the 2015 Notice is not paid by the new due date in the instructions below.

Having determined that the Department properly imposed the delinquent penalty in the Assessment and 2014 Notice, we now turn to whether the Department can waive them.

The Department has limited authority to waive or cancel penalties. RCW 82.32.105. The Department can cancel penalties if the penalties were the result of "circumstances beyond the control of the taxpayer." RCW 82.32.105(1).

WAC 458-20-228 (Rule 228) explains that "[c]ircumstances 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." Rule 228(9)(a)(ii). The circumstances must directly cause the late payment or substantial underpayment. Rule 228(9)(a)(i).

Rule 228(9)(a)(iii) lists examples of situations that are generally *not* beyond the control of a taxpayer:

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

Here, Taxpayer claims it was unaware of the requirement to file annual Reconciliations. Taxpayer has not established that it is eligible for waiver of any penalty. A lack of knowledge of a tax liability is not an immediate, unexpected emergency. Because of the nature of Washington's tax system, however, the burden of becoming informed about a tax liability falls upon the taxpayer, and it is the taxpayer who bears the consequences of a failure to be correctly informed. Det. No. 01-165R, 22 WTD 11 (2003). Taxpayer's speedy filing of Reconciliations after completion of the audit, while appreciated, cannot overcome the Department's statutory obligations to impose penalties

when the conditions for imposing them are met. Accordingly, we cannot waive the assessed penalties as there were no circumstances beyond Taxpayer's control.

### 3. Attorney's fees

Taxpayer claims that it is entitled to reimbursement of attorney's fees incurred in disputing the Department's assessment of taxes. RCW 82.32.160 allows taxpayer to seek review of any notice of "additional taxes, delinquent taxes, interest, or penalties assessed by the department." WAC 458-20-100 (Rule 100) is the Department's rule governing informal administrative reviews. A taxpayer may petition for review of any Department action in the assessment or collection of taxes. Rule 100(1). Taxpayers may be represented by an attorney, accountant, or other authorized person, but this is not required. Rule 100(5)(d). Neither RCW 82.32.160 nor Rule 100 allows for the recovery of costs incurred from representation or administrative review.

Washington follows the American rule in awarding court costs. Under that rule, a court has no power to award costs, such as attorney fees, in the absence of a contract, statute, or recognized ground of equity providing for fee recovery. *State ex rel. Macri v. Bremerton*, 8 Wn.2d 93, 113-14, 111 P.2d 612 (1941); *Rorvig v. Douglas*, 123 Wn.2d 854, 861, 873 P.2d 492 (1994). This means that any award of attorney fees and recoverable costs must be made based on a specific contract, statute or equitable theory that specifically provides for an award of allowable expenditures to the prevailing party. *Id.* Additionally, the type of costs that may be recovered are limited and specifically defined. For example, in civil court proceedings, costs allowed to a prevailing party may include: filing fees paid to the court, fees for service of process, notary fees, reasonable expenses incurred to obtain reports and records admitted into evidence, and statutory witness and attorney fees. RCW 4.84.010.<sup>5</sup> Thus, an award of allowable costs and attorney's fees must be supported by an express grant of authority.

The Department is required to administer the laws as adopted by the legislature. Chapter 82.01 RCW.<sup>6</sup> The Department's authority arises from these laws, which also establish the scope of that authority. The Department cannot grant the relief the taxpayer seeks in the absence of authority to do so. In this instance, the legislature has not provided that a Taxpayer may recover costs associated with obtaining a correction to an assessment. Unlike the provisions addressed above, which provide for the recovery of certain specific costs in court proceedings, there are no provisions providing for the recovery of attorney fees or other costs incurred in conjunction with administrative proceedings before the Department.

In Det. No. 01-005, 20 WTD 410 (2001), we addressed a similar claim by a taxpayer seeking reimbursement for costs incurred in obtaining an adjustment to an initial assessment issued after an audit. In that case we stated that:

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<sup>5</sup> There are numerous additional examples of specific statutes and rules that expressly provide for an award of court costs and attorney fees. For example, RCW 4.84.185 expressly provides for an award of attorney's fees to a prevailing party for opposing frivolous actions or defenses. RCW 26.18.160 expressly provides for recovery of specific costs incurred in enforcing an award of child support. RCW 49.48.030, also expressly provides for an award of reasonable attorney's fees for individuals who are successful in recovering a judgment for wages or salary owed. However, there is no statutory provision that allows a Taxpayer to bring a claim for the costs incurred by a Taxpayer in proceedings before the Department.

<sup>6</sup> As an administrative agency, the Department is charged to administer the Revenue Act as enacted. RCW 82.32.300. The legislative authority of the state is vested in the legislature. Constitution of the State of Washington, Article II, Section 1. The legislature has created a statutory system of administering taxes which binds the Department. Furthermore, these statutes are presumed to be constitutional and the burden is on the taxpayer to prove they are not. *Belas v. Kiga*, 135 Wn.2d 913, 959 P.2d 1037 (1998)(citing, *Sator v. Dep't of Revenue*, 89 Wn.2d 338, 572 P.2d 1094 (1977)).

There is no provision, in either laws or Department rules, for the Department to grant a credit, or otherwise compensate, a taxpayer for out-of-pocket expenses the taxpayer incurs in connection with a Department examination of the taxpayer's books and records, or subsequent appeals within the Department. The Department has no discretionary authority to grant a credit, or otherwise compensate taxpayers, for such expenses. As an administrative agency, the Department's authority is limited to that granted by statute. *See* Det. No. 87-300, 4 WTD 101 (1987); Det. No. 86- 238, 1 WTD 125 (1986).

As there is no provision for recovery of the costs incurred in conjunction with an audit or a petition for administrative review, we deny Taxpayer's request for attorney's fees.

#### DECISION AND DISPOSITION

**Document No. . . . (Assessment).** We grant the petition with respect to Taxpayer's substantial nexus with Delaware under RCW 82.04.462(3)(c) and RCW 82.04.067(1)(b); apportionable income attributable to Delaware during the Audit Period is not throw-out income. The remaining issues regarding the Assessment are denied.

**Document No. . . . (2014 Notice).** We deny the petition with respect to the 2014 Notice.

**Document No. . . . (2015 Notice).** We grant the petition with respect to the delinquent penalty included in the 2015 Notice. All other issues regarding the 2015 Notice are denied.

Dated this 19th day of January, 2018.