

No. 40008-1-II

---

**COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON**

---

**SHELL OIL COMPANY AND TESORO REFINING AND  
MARKETING COMPANY,**

**Appellants,**

**v.**

**WASHINGTON STATE DEPARTMENT OF REVENUE,**

**Respondent.**

---

**Appellants' Brief on Appeal**

---

Gregg D. Barton, WSBA No. 17022  
GBarton@perkinscoie.com  
Stephanie J. Boehl, WSBA No. 39501  
SBoehl@perkinscoie.com  
PERKINS COIE LLP  
1201 Third Avenue, Suite 4800  
Seattle, WA 98101-3099  
Telephone: 206.359.8000  
Facsimile: 206.359.9000

Peter A. Lowy, Pro Hac Vice  
Admission Pending  
Peter.A.Lowy@shell.com  
SHELL OIL COMPANY  
910 Louisiana St., Suite 4318  
Houston, TX 77002  
Telephone: 713.241.9755  
  
Attorneys for Appellants

## TABLE OF CONTENTS

I.	ASSIGNMENT OF ERROR.....	1
II.	ISSUES PRESENTED .....	1
III.	STATEMENT OF THE CASE .....	1
	A. Introduction .....	1
	B. The Hazardous Substance Tax .....	2
	C. Shell's HST Refund Claim.....	2
	D. The Superior Court Action .....	8
IV.	SUMMARY OF ARGUMENT.....	8
V.	ARGUMENT.....	10
	A. Standard of Review .....	10
	B. Shell's December 21, 2001 Refund Application Was Legally Sufficient. ....	11
	1. There Is No Legal Requirement that Refund Applications Meet a Threshold of Specificity.....	11
	a) The Tax Statutes Do Not Require Specificity in a Refund Application.....	11
	b) The Regulations Also Have No Specificity Requirement.....	12
	c) The Department's Policy Manual Expressly States that Refund Claims Need Not Be Specific. ....	14
	d) RCW 82.32.180, Relied Upon by the Superior Court to Impose a Specificity Requirement, Is Plainly Inapplicable.....	15

2.	Shell's December 21, 2001 Refund Application Was Sufficiently Detailed to Comply with Any Requirements for Refund Applications. ....	16
C.	If Shell's December 2001 Application Lacked Any Details, the Department Concedes They Were Provided in Shell's September 2003 Submissions. ....	18
D.	In the Alternative, Shell Filed a Valid Refund Application for Taxes Paid Within Four Years of the Completion of the Audit and, Therefore, Is Entitled to a Partial Refund. ....	21
VI.	CONCLUSION .....	23

## TABLE OF AUTHORITIES

### Cases

<i>Agrilink Foods, Inc. v. State Dep't of Revenue</i> , 153 Wn.2d 392, 103 P.3d 1226 (2005) .....	21
<i>Computervision Corp. v. United States</i> , 445 F.3d 1355 (Fed. Cir. 2006).....	20
<i>DOT Foods, Inc. v. Wash. Dep't of Revenue</i> , 166 Wn.2d 912, 215 P.3d 185 (2009) .....	12
<i>Douchette v. Bethel School Dist. No. 403</i> , 58 Wn. App. 824, 795 P.2d 162 (1990) .....	10
<i>Erwin v. Cotter Health Centers</i> , 161 Wn.2d 676, 167 P.3d 1112 (2007) .....	11
<i>Go2Net, Inc. v. FreeYellow.com, Inc.</i> , 158 Wn.2d 247, 143 P.3d 590 (2006) .....	10
<i>Lacey Nursing Ctr. Inc. v. Dep't of Revenue</i> , 128 Wn.2d 40, 905 P.2d 338 (1995) .....	12
<i>Miller v. Campbell</i> , 164 Wn.2d 529, 192 P.3d 352 (2008) .....	19
<i>United States v. Factors &amp; Finance Co.</i> , 288 U.S. 89, 53 S. Ct. 287, 77 L. Ed. 633 (1933).....	20
<i>Wasser &amp; Winter Co. v. State of Washington Department of Revenue</i> , Board of Tax Appeals No. 81-6 (1981) .....	22

### Statutes

RCW 82.21.010 .....	2
RCW 82.21.040 .....	2
RCW 82.21.050 .....	2
RCW 82.32.060 .....	11, 21, 22
RCW 82.32.170 .....	12
RCW 82.32.180 .....	15, 17, 20

**Regulations and Rules**

WAC 458-20-100(4).....4  
WAC 458-20-229 .....13, 14, 16  
WAC 458-20-252 .....2, 4, 5, 16  
WAC 458-20-252(4)(a) .....2, 4  
WAC 458-20-252(5)(b).....2, 4

**Other Authorities**

Department Determination No. 89-398, 8 WTD 149 (1989). .....22

## **I. ASSIGNMENT OF ERROR**

The superior court erred in denying Shell Oil Company ("Shell") a refund of \$1,194,926 in Hazardous Substance Tax ("HST") that Shell undisputedly overpaid, ostensibly on grounds that Shell failed to file timely and sufficiently detailed refund claims.

## **II. ISSUES PRESENTED**

1. What level of specificity is required in a tax refund claim, and does Shell's original refund application meet that standard?
2. May a taxpayer supplement an originally filed refund claim during administrative consideration of the original refund claim?
3. Should confirmed overpayments made within four years preceding the completion of an examination be refunded?

## **III. STATEMENT OF THE CASE**

### **A. Introduction**

This is a tax refund action for overpaid HST. There is no dispute that Shell<sup>1</sup> overpaid HST in the amount of \$1,194,926 due to credits and exemptions that it could have claimed but did not claim on its original returns for the taxable periods April 1, 1996 through July 31, 1998. The

---

<sup>1</sup> During the relevant time period, Shell Oil Company held the Anacortes refinery through its subsidiary Shell Anacortes Refining Company. Shell Oil Company sold Shell Anacortes Refining Company (and the refinery it held) to Tesoro Petroleum Corporation, which renamed the subsidiary Tesoro Refining and Marketing Company. Shell Oil Company retained the right to any tax refunds for the relevant tax periods, 1996-1998. Tesoro Refining and Marketing Company currently owns the refinery and is a named co-plaintiff-appellant. The Appellants are referred to in this brief collectively as "Shell."

only question is whether Shell properly jumped through a necessary procedural hoop to obtain a refund of its overpayment – specifically, whether Shell filed a timely and sufficiently detailed refund claim.

**B. The Hazardous Substance Tax**

Washington imposes a one-time tax on the first possession of all substances that the legislature categorizes as "hazardous." RCW 82.21.010. The HST contains numerous exemptions and credits. *See, e.g.*, WAC 458-20-252; RCW 82.21.040; RCW 82.21.050. It is undisputed that, for the periods in issue, Shell qualified for exemptions and credits that it did not claim on its originally filed returns. For instance, Shell was entitled to an exemption because it was not the first possessor of fuel on certain transactions, WAC 458-20-252(4)(a) and RCW 82.21.040(1), and a credit for tax paid on fuel carried from Washington in vehicle fuel tanks, WAC 458-20-252(5)(b) and RCW 82.21.050(1).

**C. Shell's HST Refund Claim**

For the tax years 1996-1998, Shell was a registered taxpayer and timely reported and paid taxes, including the HST. CP 197. As a large taxpayer, Shell is subject to regular audits by the State Department of Revenue (the "Department"). Here, Shell and the Department jointly and cooperatively engaged in a multi-year, complex tax audit. It began with a

September 20, 1999 notice that informed Shell that the Department would be conducting a tax audit, including Shell's HST compliance at its Anacortes refinery. CP 235.

The Department requested that Shell enter into a waiver agreement, extending the statute of limitations for the Department to examine Shell's tax compliance and make assessments. Shell agreed to sign the waivers, extending the limitations period for the 1996 tax year through December 31, 2001. CP 239. By operation of law, the waiver agreement also extended the statute of limitations for claiming refunds. The waiver provided additional time for the audit to proceed and for Shell and the Department to address potential assessments and refunds. Under the statutes and the Department's administrative rules, there are then further procedures for the parties to consider any proposed audit adjustments, refund claims and assessment notices, to seek further administrative review, and to resolve disagreements without resorting to litigation.

On December 4, 2001, the Department issued an assessment showing various taxes and interest owing in the amount of \$1,937,934. CP 260.

On December 21, 2001, before the expiration of the limitations period for refunds for 1996 and within 30 days of the assessment, Shell

filed an appeal of the assessment and a tax refund application for overpaid HST. CP 349, 353.<sup>2</sup> The application included a claim that:

Shell failed to take the export deductions, credits, and other exemptions allowable pursuant to WAC 458-20-252. We believe correction of these reporting errors will result in a tax refund of approximately \$3,000,000, plus applicable interest, for the years 1996, 1997 and 1998.

WAC 458-20-252, incorporated by reference into the application, is entitled "Hazardous Substance Tax and Petroleum Product Tax." WAC 458-20-252(4)(a) and (5)(b) include a tax exemption for "any successive possessions of any previously taxed hazardous substances", and a tax credit for "the amount of the hazardous substance tax upon the value of fuel which is carried from th[e] state in the fuel tank of any airplane, ship, truck, or other vehicle," respectively. These are the credits and exemptions that resulted in the undisputed overpayment for which Shell seeks a refund in this case.

The Department's consideration of Shell's refund claims and tax returns thereafter continued. On August 14, 2003, the Department issued the first of several Post Assessment Adjustments ("PAA #1"). Post Assessment Adjustments are issued upon reconsideration of an assessment based upon further information such as errors in what was assessed or

---

<sup>2</sup> Review of Department action generally is required within a 30-day period. WAC 458-20-100(4).

taking into account overpayments. CP 357. PAA #1 denied refund applications dated October 12, 2001 and December 13, 2001, which are not at issue, but did not deny the one dated December 21, 2001. CP 413.

On September 12, 2003 and September 15, 2003, in response to PAA #1, Shell filed timely petitions seeking further administrative review of the assessment and refund claims that the PAA denied, CP 416-419, 115-120, and supplementing the December 21, 2001 application for a HST refund by further identifying the credits and exemptions that it was seeking under WAC 458-20-252 and providing the amounts of the overpayments still owing, with supporting schedules. A summary of the claims is as follows:

<b>Tax</b>	<b>Type</b>	<b>Reason Stated</b>	<b>Amount</b>
HST	Exemption	Truck / rail exchange receipts (i.e., not first possessor), on in-state purchases.	\$568,079
HST	Exemption	Pipeline / marine terminal product purchases (i.e., not first possessor), on in-state purchases.	\$313,200

HST	Exemption	Pipeline/marine terminal exchange receipts (i.e., not first possessor), on in-state purchases.	\$141,728
HST	Preparer Over Reporting		\$415,588
HST	Credit	Fuel-in-tank credit other than jet fuel.	\$534,637
	<b>Total</b>		<b>\$1,973,232</b>

CP 220 (Department's Memorandum agreeing to overpaid amounts). The detail in the supplemental refund applications simply itemized credits and exemptions that were part of the \$3,000,000 referenced in the original application and for which a refund was not yet granted.

After supplementing its HST refund application, Shell continued to work cooperatively with the Department in the administrative process. CP 474. The Department continued to verify Shell's claims. CP 424 (Department letter, dated March 18, 2004, explaining that the audit division was giving further consideration to the merits of the refund claim). Through the forgoing give-and-take process between Shell and the Department, the parties whittled down the issues and refined the amounts in issue, eventually reaching agreement on the amount of overpayment.<sup>3</sup> CP 573.

---

<sup>3</sup> The parties agree that Shell was granted a credit of \$415,588 and \$362,718 and that the outstanding claim is \$1,194,926. CP 573.

On June 7, 2005, while the administrative process was still in progress, the Department issued a further adjustment to the examination – Post Assessment Adjustment #2 ("PAA #2") – which rejected Shell's HST refund claim on the ground that the 2003 application was untimely. CP 135.<sup>4</sup> In response to this examination adjustment, on August 5, 2005, Shell submitted a timely petition for review. CP 472. On August 8, 2008, the Department determined as a legal matter that at least any assessment would be offset by any overpayment and that Shell had previously substantiated nearly \$2 million in overpayments. CP 545. Following that, on January 15, 2008, the Department issued its third and final adjustment ("PAA #3") to the examination, in which the Department reconfirmed that it had sufficient information to substantiate the \$1,973,234 in credits and exemptions. CP 514, 531.

Notwithstanding its determination that Shell had \$1,973,234 in additional credits and exemptions, still the Department denied the claim to the extent it exceeded the remaining assessment. CP 532. Consequently, the Department determined that Shell was entitled to use the overpayment to offset a deficiency that the Department had determined during the audit (i.e., reduce the deficiency by the amount of the overpayment), but the Department disallowed a cash refund or a credit toward future liabilities

---

<sup>4</sup> But PAA # 2 failed to mention the December 21, 2001 refund application. CP 135.

for the amount by which the overpayment exceeded the deficiency, leaving \$1,194,926 that had not been absorbed by the deficiency and that the Department refused to return to Shell.

Thus, the result of the Department's decision was to deprive Shell of a refund or credit in the amount of \$1,194,926 even though the Department agreed that Shell had overpaid that amount.

**D. The Superior Court Action**

On September 5, 2008, Shell filed a timely action in superior court in Thurston County, seeking refund of the \$1,194,926 overpaid HST. CP 5. On October 30, 2009, the superior court heard cross-motions for summary judgment. At the conclusion of the hearing, the superior court orally denied Shell's motion and granted the Department's motion, entering an order the same day. CP 654. On November 19, 2009, Shell filed its Notice of Appeal. CP 3.

**IV. SUMMARY OF ARGUMENT**

This appeal presents a simple question of statutory construction and a question of basic fairness in how the laws concerning tax refunds are to be applied to taxpayers who overpay their taxes. The Department concedes that Shell overpaid HST in the amount of \$1,194,926 during 1996-1998. The only question is whether Shell properly jumped through the procedural hoop of filing a sufficient refund claim. The superior court

erred in ruling that Shell's original HST refund application (filed December 21, 2001) lacked any necessary specificity or was untimely, thereby denying Shell its refund. Its ruling rests on a misapplication of the statutes.

The December 21, 2001 refund application was sufficient to support a refund for the \$1,194,926 remaining overpayment that the Department is refusing to pay Shell. Shell filed a refund claim that put the Department on notice that it was seeking a refund for as much as \$3 million under the HST provision of Washington's tax statutes. At the time of the refund claim, there was no statutory, regulatory or other legal authority that required more information. Shell's application satisfied all statutory requirements. Indeed, the regulation on refund applications says that a taxpayer *may* provide more detailed information to expedite the refund, but it does not require any level of specificity. Moreover, the Department's position below was inconsistent with its own policy manual, which states that a general statement of entitlement to a refund will suffice. Shell's refund application met and exceeded that standard.

But even if this Court were to conclude that the December 21, 2001 refund application lacked sufficient specificity, further details were provided in September 2003, years before the Department's review was concluded in 2008.

The superior court's holding is not only legally incorrect but is unfair to taxpayers. The Department strained to keep over \$1.1 million that it agreed belonged to Shell by imposing a requirement on refund applications that cannot be found anywhere in the law. No taxpayer could have read the applicable statutory or regulatory authority and been on notice that the failure to provide more details in the refund application could result in the loss of a right to obtain a refund -- not when the governing rules and Department policy manual provide otherwise. The superior court's decision was wrong and has produced an unjust result. This Court should correct the superior court's error and grant Shell its refund.

## V. ARGUMENT

### A. Standard of Review

This Court reviews the superior court's summary judgment ruling *de novo*. See *Go2Net, Inc. v. FreeYellow.com, Inc.*, 158 Wn.2d 247, 252, 143 P.3d 590 (2006); *Douchette v. Bethel School Dist. No. 403*, 58 Wn. App. 824, 795 P.2d 162 (1990) (reversing trial court and rendering summary judgment dismissing plaintiff's claim of employment discrimination as time-barred), *aff'd with modifications*, 117 Wn.2d 805, 818 P.2d 1362 (1991). This Court likewise reviews questions of law, including applying the facts of the case to the law, *de novo*. *Erwin v.*

*Cotter Health Centers*, 161 Wn.2d 676, 687, 167 P.3d 1112 (2007) ("The process of determining the applicable law and applying it to these facts is a question of law that we review de novo.").

Here, the material facts are undisputed – Shell overpaid the tax at issue, and it timely filed its refund application. This compels the conclusion that, as a matter of law, Shell is entitled to a refund of \$1,194,926.

**B. Shell's December 21, 2001 Refund Application Was Legally Sufficient.**

There is no dispute that Shell overpaid its HST for tax periods April 1, 1996 through July 31, 1998, and filed a timely refund application on December 21, 2001. The question is whether there is an unwritten standard for the level of specificity required in refund applications, whether such an unwritten standard is enforceable and, regardless of the enforceability issue, whether Shell's December 21, 2001 refund claim met the applicable standard.

**1. There Is No Legal Requirement that Refund Applications Meet a Threshold of Specificity.**

**a) The Tax Statutes Do Not Require Specificity in a Refund Application.**

The relevant Washington statute, RCW 82.32.060(1), provides taxpayers with the right to apply for a refund, but it does not impose requirements on the contents of an application:

If, upon receipt of an application by a taxpayer for a refund . . . , it is determined by the department that . . . any amount of tax, penalty, or interest has been paid in excess of that properly due, the excess amount paid within, or attributable to, such period must be credited to the taxpayer's account or must be refunded to the taxpayer, at the taxpayer's option.

Nowhere in the statute is there a requirement that the taxpayer provide detailed reasons for its refund claim. Nor should the court add a specificity requirement to the statute. *See DOT Foods, Inc. v. Wash. Dep't of Revenue*, 166 Wn.2d 912, 920, 215 P.3d 185 (2009) ("We cannot add words or clauses to a statute when the legislature has chosen not to include such language.") (citation omitted). When a taxpayer "satisfies the conditions specified under the statute," its tax refund may proceed. *Lacey Nursing Ctr. Inc. v. Dep't of Revenue*, 128 Wn.2d 40, 53, 905 P.2d 338 (1995).<sup>5</sup>

**b) The Regulations Also Have No Specificity Requirement.**

The Department's own administrative code does not impose a specificity requirement. Indeed, it suggests just the opposite.

---

<sup>5</sup> RCW 82.32.170, relied on by the Department in the trial court, contains some language pertaining to refund claims but also does not contain any specificity requirement. It merely provides that if a taxpayer requests a conference, the taxpayer must state the reasons that justify a conference, as the colloquy between the judge and counsel for the Department confirmed: "MR. ZALESKY: [A]fter explaining sort of the requirements under [RCW 82.32.170] that it has to be in writing, that the petition has to set forth the reasons for claiming or requesting a hearing, I'm sorry, it's requesting a conference. . . . So Tesoro has sort of taken that conference language out of context to say that doesn't mean setting forth the reasons for the refund. THE COURT: Well, aren't those two different things, though? . . . [C]ould you contest the tax without having a conference? MR. ZALESKY: In fact, that's normally what happens. . . ." RP 9.

Subsection (3) of WAC 458-20-229 ("Rule 229"), in effect at the time of Shell's refund application (but since superseded), states:

[w]hen a taxpayer discovers that it has overpaid taxes . . . it may file an amended return or a petition for refund or credit with the department . . . . The amended tax returns or petitions are subject to future verification or examination of the taxpayer's records . . .

Rule 229(3)(b). The regulation provides no requirement that the contents of the application be specific, but instead provides for a verification and examination procedure under which the Department may obtain specificity.

Moreover, the regulation at subsection (4) goes on to state:

**Prompt Refunds** - Taxpayers may expect refund requests to be processed promptly by the department. Refunds can generally be *processed faster* if the taxpayer provides the following information at the time a refund application is made:

\* \* \*

(c) The taxpayer *should include* a detailed description or explanation of the claimed overpayment.

Rule 229(4) (emphasis added). This regulation says that a taxpayer, at its discretion, may voluntarily include "a detailed description or explanation" to expedite the payment. The fact that subsection (4) of the regulation states that taxpayers *should* supply detailed reasons, if they wish an expedited refund, strongly suggest that supplying detailed reasons is not *mandatory* for regular, nonexpedited refunds described in subsection (3).

The superior court's imposition of a specificity requirement is therefore inconsistent with Rule 229, which implies that the refund application's level of detail affects only the speed of the refund, not the procedural validity of the refund application.

**c) The Department's Policy Manual Expressly States that Refund Claims Need Not Be Specific.**

The Department's policy manual expressly states that taxpayers need not provide detailed explanations in their refund applications:

Applications can be as basic as a notice of claim from the taxpayer to the Department . . . In some cases, these requests are nothing more than a statement that the taxpayer "may" be entitled to a refund . . . It does not have to contain all the information needed to review the refund at that time, simply enough information that the Department knows how to proceed (who to contact, general type of refund).

CP 188 (Department's Mainstream Tax Processing Manual). Thus, under the Department's policies and procedures, a timely refund claim is valid even if it merely informs the Department that a taxpayer seeks a refund for a certain period and type of tax. RP 10-11 (Department's counsel conceding that the Department processes refund claims even if the application just generally says that taxpayer is entitled to a refund or is entitled to additional deductions). There is no question that Shell's initial December 2001 refund application did far more than that.

**d) RCW 82.32.180, Relied Upon by the Superior Court to Impose a Specificity Requirement, Is Plainly Inapplicable.**

The superior court's lone reference to legal authority does not support its ruling. The court cites RCW 82.32.180. RP 39. RCW 82.32.180, however, provides no legal support for a conclusion that Shell's application lacked the requisite specificity.

Indeed, that statutory provision does not have anything to do with what constitutes a legally sufficient refund application but rather permits a taxpayer the right to appeal a refund claim to superior court:

**Court appeal – Procedure.** Any person . . . may appeal to the superior court of Thurston county . . . for a refund . . . . In the appeal the taxpayer shall set forth the amount of the tax imposed upon the taxpayer which the taxpayer concedes to be the correct tax and the reason why the tax should be reduced or abated.

RCW 82.32.180.

This statute says nothing about refund applications, much less dictates the information that must be included in one. RCW 82.32.180's purpose and application is specific to *court* proceedings, not the Department's *administrative* procedures concerning the substantive content of refund applications and their timing. Notably, the Department did not rely on this statute below, which further confirms the superior court's mistaken reliance on it to impose a new requirement for refund

applications that has no basis in any legal provision and is at odds with Rule 229 and the Department's policy manual.

**2. Shell's December 21, 2001 Refund Application Was Sufficiently Detailed to Comply with Any Requirements for Refund Applications.**

Given the absence of any statutory requirements and the Department's policy that a taxpayer's statement that it seeks a refund for a certain period and type of tax is sufficient, Shell's December 2001 application far surpassed any legal requirements to support payment of the refund.

The December 2001 application specified the type of tax (hazardous substance tax), the tax period (April 1, 1996 through July 31, 1998), the kind of overpayment (credits, deductions, exemptions) and the overpayment amount (\$3,000,000, which included the \$1,194,926 at issue). It also specified that Shell claimed credits and exemptions under WAC 458-20-252, which includes the exemption for "any successive possessions of any previously taxed hazardous substances," and the credit for "the amount of the hazardous substance tax upon the value of fuel which is carried from the state in the fuel tank of any airplane, ship, truck, or other vehicle," which form the basis for the refund that the Department denied. Given this level of detail, and the failure of the superior court to

identify any standard that Shell's application failed to meet, there was no legal basis for the superior court's decision.<sup>6</sup>

Moreover, there are no compelling policy reasons to deny Shell's refund. Shell indisputably overpaid its taxes and is being denied a refund of over \$1 million based on credits and exemptions to which it was legally entitled. Also indisputably, the Department had ample time at the administrative level to review – and in fact did review – the details of Shell's refund during a complex administrative process that Shell and the Department jointly and cooperatively managed over the course of about eight years. Further, Shell in good faith believed its applications were sufficient. While taxpayers have an incentive to file detailed applications, because the applicable rules state that doing so expedites the refund, and not doing so creates a risk that the Department may deny the refund application and force the taxpayer into potentially costly and drawn-out litigation, no taxpayer could have read the applicable statutory or regulatory authority and been on notice that the failure to provide details in the refund application could result in the loss of a right to obtain a refund – especially not when the governing rules and internal Department policy manual provide otherwise.

---

<sup>6</sup> "I find that on the basis of 82.32.180, there is some ending point for specifying the basis for a refund claim. Frankly, I don't know exactly what that is, but . . . I find that the specificity was not provided timely." RP 39-40.

**C. If Shell's December 2001 Application Lacked Any Details, the Department Concedes They Were Provided in Shell's September 2003 Submissions.**

Even if this Court were to conclude that the December 21, 2001 refund application lacked sufficient specificity, any alleged missing information was provided by September 2003, years before the administrative review was completed in 2008. The Department does not dispute that the September 2003 petitions provide sufficient specificity. The Department claims only that the September 2003 petitions came too late and that their contents should have been contained in the December 2001 claim. The superior court, too, appears to have drawn this conclusion. *See* RP 39-40.

But the September 2003 petitions were filed long before the Department completed its administrative review in 2008, giving the Department ample time to consider their merits, and should qualify to supplement the original claim under established administrative practice and apt legal doctrine.

There is an accepted, time-honored administrative practice involving protective refunds – where taxpayers lodge refund claims prior to the expiration of the statute of limitations and later supply greater detail. *See* CP 188 (Department's Mainstream Tax Processing Manual). Upon examination of the claim, however, the taxpayer will need to supply detail

and substantiation; otherwise, its claim will be denied. *Id.* This practice is consistent with the kind of tax audits that the Department conducts on Shell, which last multiple years, involve give-and-take between the parties, and are marked by multiple rounds of adjustments and administrative reviews along the way. Shell's December 2001 and September 2003 refund requests came within this practice. The Department should not be permitted to ignore its own policy statement endorsing this practice, without notice to taxpayers that it was changing the rules in the middle of the game.

Moreover, there is an analogous body of law that supports the conclusion that the September 2003 petitions properly supplement the December 21, 2001 claim. Under the "relation back" doctrine, a substantive defect in an original complaint can be cured by a subsequent one. *See Miller v. Campbell*, 164 Wn.2d 529, 538, 192 P.3d 352 (2008) (allowing party to file an amended petition out of time to substitute the real party in interest, because the amendment did not change the nature of the claims against which the defendant must defend).

Using that same rationale, the federal courts, under the "general claims" doctrine, have long allowed taxpayers to file amended claims to supplement refund claims that were timely filed but too general. The U.S. Supreme Court long ago held that a taxpayer's supplemental refund claim,

filed after the applicable statutory period, was valid because it amended a refund claim that had been timely filed. *United States v. Factors & Finance Co.*, 288 U.S. 89, 94, 53 S. Ct. 287, 77 L. Ed. 633 (1933). That doctrine's validity has been reaffirmed over the years by the courts. *See Computervision Corp. v. United States*, 445 F.3d 1355, 1368 (Fed. Cir. 2006) (reaffirming general claims doctrine for tax refund applications).

Finally, the superior court's lone reference to legal authority does not support cutting off the time to supplement the original claim. The court stated: "I find that on the basis of 82.32.180, there is some ending point for specifying the basis for a refund claim. Frankly, I don't know exactly what that is. . . ." RP 39-40. As discussed above, *see supra*, Section (V)(B)(1)(d), RCW 82.32.180's purpose and application is specific to *court* proceedings, not the Department's *administrative* procedures, and says nothing about the timeliness of refund claims. Indeed, the superior court's statement that "there is some ending point . . . [f]rankly, I don't know exactly what that is," acknowledges that this provision does not establish a point at which a clarification is too late.

In short, the September 2003 petitions, filed in ample time for the Department to review the details of Shell's claim on the administrative level, plainly relate back to the December 2001 HST refund claim that the Department has acknowledged was timely. This Court should hold that

the September 2003 supplemental petitions relate back to the initial refund application. And because the Department concedes that the 2003 petitions contained sufficient specificity, the superior court should have found that the December 2001 application was legally sufficient to support payment of the refund.

**D. In the Alternative, Shell Filed a Valid Refund Application for Taxes Paid Within Four Years of the Completion of the Audit and, Therefore, Is Entitled to a Partial Refund.**

In the alternative, if this Court concludes Shell did not file a timely and sufficiently detailed refund claim within the extended period for making assessments and refunds, this Court should grant a partial refund under the alternative time period for obtaining a refund.

RCW 82.32.060(1) sets forth the time periods for filing refund claims. It provides:

[N]o refund or credit may be made for taxes, penalties, or interest paid *more than four years* prior to the beginning of the calendar year in which the refund application is made *or examination of records is completed.*

RCW 82.32.060(1) (emphasis added). Accordingly, the statute sets forth an alternative period whereby a refund may be granted if it pertains to amounts paid within four years preceding the beginning of the calendar year in which "examination of records is complete[]." The language of this statute is plain and thus controls. *See Agrilink Foods, Inc. v. State Dep't of Revenue*, 153 Wn.2d 392, 396-97, 103 P.3d 1226 (2005) ("Where

statutory language is plain and unambiguous courts will not construe the statute but will glean the legislative intent from the words of the statute itself, regardless of contrary interpretation by an administrative agency," and noting "the complete absence of any express language establishing [any additional] requirement.") (citations omitted).<sup>7</sup>

Here, the Department reviewed and determined the overpayment during its administrative review of Shell's audit and refund claims, and it must concede that the refund amounts attributable to the 1997-1998 periods were paid within four years preceding the examination's completion. According to the Department, an examination is complete when an assessment is issued. Department Determination No. 89-398, 8 WTD 149 (1989).<sup>8</sup> The Department issued its initial assessment on December 4, 2001. CP 260. Accordingly, at a minimum, this Court should grant Shell's refunds for the 1997-1998 periods.

---

<sup>7</sup> The Department claims that the Board of Tax Appeal's decision interpreting this language is in error. RP 21. *Wasser & Winter Co. v. State of Washington Department of Revenue*, Board of Tax Appeals No. 81-6 (1981), affirmed by the Superior Court and available at CP 32-64, held that RCW 82.32.060 "allows the taxpayer four years after audit completion to petition for refund of all overpayment during the period. . . . To allow the taxpayer anything other than the 4 years to petition for the refund [after an audit is completed] is to render the statute incapable of even-handed interpretation and any certainty of fairness"). While asserting it is in error, the Department does not give meaning to the words. RP 21. Shell does.

<sup>8</sup> Published Department Determinations are available at <http://taxpedia.dor.wa.gov/>.

## VI. CONCLUSION

This Court should reverse the judgment below, which granted summary judgment in favor of the Department and denied Shell's summary judgment motion. Because the facts are undisputed and Shell is entitled to judgment as a matter of law, this Court should also order a refund in Shell's favor for \$1,194,926 plus applicable interest on such amount.

DATED: January 28, 2010

**PERKINS COIE LLP**

By:   
Gregg D. Barton, WSBA No. 17022  
Stephanie J. Boehl, WSBA No. 39501

Attorneys for Appellants  
SHELL OIL COMPANY AND TESORO  
REFINING AND MARKETING  
COMPANY

**CERTIFICATE OF SERVICE**

I, Theresa A. Trotland, certify that on January 28, 2010, I caused a copy of the Appellants' Brief on Appeal to be hand delivered to:

Charles Zalesky  
Assistant Attorney General  
Attorney General of Washington  
Revenue Division  
7141 Cleanwater Drive S.W.  
Tumwater, WA

Dated this 28th day of January, 2010.

  
Theresa A. Trotland

RECEIVED  
JAN 29 2010  
4  
TUMWATER, WA  
REVENUE DIVISION

## APPENDIX

- 1) **RCW 82.32.060**
- 2) **RCW 82.32.170**
- 3) **RCW 82.32.180**
- 4) **WAC 458-20-229 in effect for the period at issue (CP 29-30)**
- 5) **Department Mainstream Tax Processing Manual – Protective Refund Claims (CP 188-89)**
- 6) **Department Determination No. 89-398, 8 WTD 149 (1989)**

**82.32.060 Excess payment of tax, penalty, or interest—Credit or refund—Payment of judgments for refund.** (1) If, upon receipt of an application by a taxpayer for a refund or for an audit of the taxpayer's records, or upon an examination of the returns or records of any taxpayer, it is determined by the department that within the statutory period for assessment of taxes, penalties, or interest prescribed by RCW 82.32.050 any amount of tax, penalty, or interest has been paid in excess of that properly due, the excess amount paid within, or attributable to, such period shall be credited to the taxpayer's account or shall be refunded to the taxpayer, at the taxpayer's option. Except as provided in subsection (2) of this section, no refund or credit shall be made for taxes, penalties, or interest paid more than four years prior to the beginning of the calendar year in which the refund application is made or examination of records is completed.

(2)(a) The execution of a written waiver under RCW 82.32.050 or 82.32.100 shall extend the time for making a refund or credit of any taxes paid during, or attributable to, the years covered by the waiver if, prior to the expiration of the waiver period, an application for refund of such taxes is made by the taxpayer or the department discovers a refund or credit is due.

(b) A refund or credit shall be allowed for an excess payment resulting from the failure to claim a bad debt deduction, credit, or refund under RCW 82.04.4284, 82.08.037, 82.12.037, 82.14B.150, or 82.16.050(5) for debts that became bad debts under 26 U.S.C. Sec. 166, as amended or renumbered as of January 1, 2003, less than four years prior to the beginning of the calendar year in which the refund application is made or examination of records is completed.

(3) Any such refunds shall be made by means of vouchers approved by the department and by the issuance of state warrants drawn upon and payable from such funds as the legislature may provide. However, taxpayers who are required to pay taxes by electronic funds transfer under RCW 82.32.080 shall have any refunds paid by electronic funds transfer.

(4) Any judgment for which a recovery is granted by any court of competent jurisdiction, not appealed from, for tax, penalties, and interest which were paid by the taxpayer, and costs, in a suit by any taxpayer shall be paid in the same manner, as provided in subsection (3) of this section, upon the filing with the department of a certified copy of the order or judgment of the court.

(a) Interest at the rate of three percent per annum shall be allowed by the department and by any court on the amount of any refund, credit, or other recovery allowed to a taxpayer for taxes, penalties, or interest paid by the taxpayer before January 1, 1992. This rate of interest shall apply for all interest allowed through December 31, 1998. Interest allowed after December 31, 1998, shall be computed at the rate as com-

puted under RCW 82.32.050(2). The rate so computed shall be adjusted on the first day of January of each year for use in computing interest for that calendar year.

(b) For refunds or credits of amounts paid or other recovery allowed to a taxpayer after December 31, 1991, the rate of interest shall be the rate as computed for assessments under RCW 82.32.050(2) less one percent. This rate of interest shall apply for all interest allowed through December 31, 1998. Interest allowed after December 31, 1998, shall be computed at the rate as computed under RCW 82.32.050(2). The rate so computed shall be adjusted on the first day of January of each year for use in computing interest for that calendar year.

(5) Interest allowed on a credit notice or refund issued after December 31, 2003, shall be computed as follows:

(a) If all overpayments for each calendar year and all reporting periods ending with the final month included in a notice or refund were made on or before the due date of the final return for each calendar year or the final reporting period included in the notice or refund:

(i) Interest shall be computed from January 31st following each calendar year included in a notice or refund; or

(ii) Interest shall be computed from the last day of the month following the final month included in a notice or refund.

(b) If the taxpayer has not made all overpayments for each calendar year and all reporting periods ending with the final month included in a notice or refund on or before the dates specified by RCW 82.32.045 for the final return for each calendar year or the final month included in the notice or refund, interest shall be computed from the last day of the month following the date on which payment in full of the liabilities was made for each calendar year included in a notice or refund, and the last day of the month following the date on which payment in full of the liabilities was made if the final month included in a notice or refund is not the end of a calendar year.

(c) Interest included in a credit notice shall accrue up to the date the taxpayer could reasonably be expected to use the credit notice, as defined by the department's rules. If a credit notice is converted to a refund, interest shall be recomputed to the date the refund is issued, but not to exceed the amount of interest that would have been allowed with the credit notice. [2004 c 153 § 306; 2003 c 73 § 2; 1999 c 358 § 13; 1997 c 157 § 2; 1992 c 169 § 2; 1991 c 142 § 10; 1990 c 69 § 1; 1989 c 378 § 20; 1979 ex.s. c 95 § 4; 1971 ex.s. c 299 § 17; 1965 ex.s. c 173 § 27; 1963 c 22 § 1; 1961 c 15 § 82.32.060. Prior: 1951 1st ex.s. c 9 § 6; 1949 c 228 § 21; 1935 c 180 § 189; Rem. Supp. 1949 § 8370-189.]

**Retroactive effective date—Effective date—2004 c 153:** See note following RCW 82.08.0293.

**Effective date—2003 c 73 § 2:** "Section 2 of this act takes effect January 1, 2004." [2003 c 73 § 3.]

**Effective date—1999 c 358 §§ 1 and 3-21:** See note following RCW 82.04.3651.

**Effective date—Applicability—1992 c 169:** See note following RCW 82.32.050.

**Effective date—1991 c 142 §§ 9-11:** See note following RCW 82.32.050.

**Severability—1991 c 142:** See RCW 82.32A.900.

**82.32.170 Reduction of tax after payment—Petition—Conference—Determination by department.** Any person, having paid any tax, original assessment, additional assessment, or corrected assessment of any tax, may apply to the department within the time limitation for refund provided in this chapter, by petition in writing for a correction of the amount paid, and a conference for examination and review of the tax liability, in which petition he shall set forth the reasons why the conference should be granted, and the amount in which the tax, interest, or penalty, should be refunded. The department shall promptly consider the petition, and may grant or deny it. If denied, the petitioner shall be notified by mail, or electronically as provided in RCW 82.32.135, thereof forthwith. If a conference is granted, the department shall notify the petitioner by mail, or electronically as provided in RCW 82.32.135, of the time and place fixed therefor. After the hearing the department may make such determination as may appear to it just and lawful, and shall mail a copy of its determination to the petitioner, or provide a copy of its determination electronically as provided in RCW 82.32.135. [2007 c 111 § 111; 1967 ex.s. c 26 § 50; 1961 c 15 § 82.32.170. Prior: 1951 1st ex.s. c 9 § 11; 1939 c 225 § 29, part; 1935 c 180 § 199, part; RRS § 8370-199, part.]

**Part headings not law—2007 c 111:** See note following RCW 82.16.120.

**Effective date—1967 ex.s. c 26:** See note following RCW 82.01.050.

**82.32.180 Court appeal—Procedure.** Any person, except one who has failed to keep and preserve books, records, and invoices as required in this chapter and chapter 82.24 RCW, having paid any tax as required and feeling aggrieved by the amount of the tax may appeal to the superior court of Thurston county, within the time limitation for a refund provided in chapter 82.32 RCW or, if an application for refund has been made to the department within that time limitation, then within thirty days after rejection of the application, whichever time limitation is later. In the appeal the taxpayer shall set forth the amount of the tax imposed upon the taxpayer which the taxpayer concedes to be the correct tax and the reason why the tax should be reduced or abated. The appeal shall be perfected by serving a copy of the notice of appeal upon the department within the time herein specified and by filing the original thereof with proof of service with the clerk of the superior court of Thurston county.

The trial in the superior court on appeal shall be de novo and without the necessity of any pleadings other than the notice of appeal. At trial, the burden shall rest upon the taxpayer to prove that the tax as paid by the taxpayer is incorrect, either in whole or in part, and to establish the correct amount of the tax. In such proceeding the taxpayer shall be deemed the plaintiff, and the state, the defendant; and both parties shall be entitled to subpoena the attendance of witnesses as in other civil actions and to produce evidence that is competent, relevant, and material to determine the correct amount of the tax that should be paid by the taxpayer. Either party may seek appellate review in the same manner as other civil actions are appealed to the appellate courts.

It shall not be necessary for the taxpayer to protest against the payment of any tax or to make any demand to have the same refunded or to petition the director for a hearing in order to appeal to the superior court, but no court action or proceeding of any kind shall be maintained by the taxpayer to recover any tax paid, or any part thereof, except as herein provided.

The provisions of this section shall not apply to any tax payment which has been the subject of an appeal to the board of tax appeals with respect to which appeal a formal hearing has been elected. [1997 c 156 § 4; 1992 c 206 § 4; 1989 c 378 § 23; 1988 c 202 § 67; 1971 c 81 § 148; 1967 ex.s. c 26 § 51; 1965 ex.s. c 141 § 5; 1963 ex.s. c 28 § 9; 1961 c 15 § 82.32.180. Prior: 1951 1st ex.s. c 9 § 12; 1939 c 225 § 29, part; 1935 c 180 § 199, part; RRS § 8370-199, part.]

**Effective date—1992 c 206:** See note following RCW 82.04.170.

**Severability—1988 c 202:** See note following RCW 2.24.050.

*Appeal to board of tax appeals, formal hearing: RCW 82.03.160.*

**WAC 458-20-229 Refunds. (1) Introduction.** This section explains the procedures relating to refunds or credits for overpayment of taxes, and penalties or interest. It indicates the statutory period for refunds and the interest rate which applies to those refunds.

**(2) Statute of limitations for refunds or credits.**

(a) With the exception of (b) of this subsection, no refund or credit may be made for taxes, penalties, or interest paid more than four years prior to the beginning of the calendar year in which a refund or credit application is made or examination of records by the department is completed.

(b) Where a taxpayer has executed a written waiver of the limitations governing assessment under RCW 82.32.050 or 82.32.100, a refund or credit may be granted for taxes, penalties, or interest paid during, or attributable to, the years covered by such waiver if, prior to expiration of the waiver period, an application for a refund or credit of such taxes, penalties, or interest is made by the taxpayer or the department discovers a refund or credit is due. (Refer to WAC 458-20-230 for the circumstances under which the department may request a taxpayer to execute a statute of limitations waiver.)

**(3) Refund/credit procedures.** Refunds are initiated in the following ways:

(a) **Departmental review.** When the department audits or examines the taxpayer's records and determines the taxpayer has overpaid its taxes, penalties, or interest, the department will issue a refund or a credit, at the taxpayer's option. When overpayments are discovered by the department within the statute of limitations, the taxpayer does not need to file a petition or request for a refund or credit.

(b) **Taxpayer request.** When a taxpayer discovers that it has overpaid taxes, penalties, or interest, it may file an amended return or a petition for refund or credit with the department. The petition or amended tax return must be submitted within the statute of limitations. Refund or credit requests should generally be made to the division of the department to which payment of the tax, penalty, or interest was originally made. The amended tax returns or petitions are subject to future verification or examination of the taxpayer's records. If it is later determined that the refund or credit exceeded the amount properly due the taxpayer, an assessment may be issued to recover the excess amount provided the assessment is made within four years of the close of the tax year in which the taxes were due or prior to the expiration of a statute of limitations waiver. The following are examples of refund or credit requests:

(i) A taxpayer discovers in January 1992 that the June 1991 combined excise tax return was prepared using incorrect figures which overstated its sales resulting in an overpayment of tax. The taxpayer files an amended June 1991 tax return with the department's taxpayer account administration division. The department treats the taxpayer's amended June 1991 tax return as a petition for refund or credit of the amounts overpaid during that tax period and may take whatever action it considers appropriate under the circumstances to verify the overpayment.

(ii) A customer of a seller pays retail sales tax on a transaction which the customer later believes was not taxable. The customer should request a refund or credit directly from the seller from whom the purchase was made. If the seller deter-

mines the tax was not due and issues a refund or credit to the customer, the seller may request a refund or credit from the department. It is generally to the advantage of a consumer to seek a refund directly from the seller for retail sales tax believed to have been paid in error. This is because the seller has the source records to know if retail sales tax was collected on the original sale, knows the customer, knows the circumstances surrounding the original sale, is aware of any disputes between itself and the customer concerning the product, may already be aware of the circumstances as to why a refund of sales tax is appropriate such as the return of the merchandise. When in doubt as to whether sales tax should be refunded, a seller may contact the department and request advice. However, in certain situations, upon presentation of acceptable proof of payment of retail sales tax, the department will consider making refunds of retail sales tax directly to consumers. These situations are as follows:

(A) The seller is no longer engaged in business.

(B) The seller has moved and the consumer can not locate the seller.

(C) The seller is insolvent and is financially unable to make the refund.

(D) The consumer has attempted to obtain a refund from the seller and can document that the seller refuses to refund the retail sales tax. However, the department will not consider making refunds directly to consumers when the law leaves it at the discretion of the seller to collect the tax. See, for example, RCW 82.08.0273.

(iii) The department completes an audit of the taxpayer's records relating to taxes reported on combined excise tax returns and an assessment is issued. After the assessment is paid, but within the statute of limitations for refund or credit, the taxpayer locates additional records which would have reduced the tax, penalties, or interest liability if these records had been available in the audit. The taxpayer contacts the department's audit division, requests that a reexamination of the appropriate records be performed, and files a petition for a refund or credit of overpaid amounts. The statute of limitations will be determined based on the date the assessment was paid for an adjustment of taxes, penalties, or interest assessed in the audit. For taxes, penalties, or interest paid through the filing of combined excise tax returns by the taxpayer, the statute of limitations will be based on the date the amounts were paid without regard to when the audit was completed or the assessment was issued.

(c) **Taxpayer appeal.** If the taxpayer believes that the tax, penalties, or interest overpayment is the result of a difference of legal opinion with the department as to the taxability of a transaction, the application of penalties or the inclusion of interest, the taxpayer may appeal to the department as provided in WAC 458-20-100 or directly to Thurston County superior court.

(d) **Court decision.** Refunds or credits will be made by the department as required by decisions of any court of competent jurisdiction when the decision of the court is not being appealed.

(i) In the case of court actions regarding refund or credit of retail sales taxes, the department will not require that consumers obtain a refund of retail sales tax directly from the seller if it would be unreasonable and an undue burden on the person seeking the refund to obtain the refund from the seller.

In this case the department may make the refunds directly to the claimant and may use the public media to attempt to notify all persons who may be entitled to refunds or credits.

(ii) Forms for applications for refunds for these situations will be available either by mail or at the department's offices and the claimant will need to file an application for refund. The application will request the appropriate information needed to identify the claimant, item purchased, amount of sales tax to be refunded, and the seller. The department may at its discretion request additional documentation which the claimant could reasonably be expected to retain, based on the particular circumstances and value of the transaction. Such refund requests shall be approved or denied within thirty days after all documentation has been submitted by the claimant and legal questions have been resolved. If approved for refund, such refunds shall be made within sixty days after all documentation has been submitted.

(4) Prompt refunds. Taxpayers may expect refund requests to be processed promptly by the department. Refunds can generally be processed faster if the taxpayer provides the following information at the time a refund application is made:

(a) The taxpayer should include its registration number on all documents.

(b) The taxpayer should include the telephone number and name of the person the department should contact in case the department needs additional information or has questions.

(c) The taxpayer should include a detailed description or explanation of the claimed overpayment.

(d) Amended tax returns or worksheets should be attached to the refund or credit application and clearly identify the tax reporting periods involved.

(e) If the refund or credit request involves a situation where a seller has refunded retail sales tax to a customer and the seller is now seeking a refund or credit of the tax from the department, proof of refund to the customer should be attached.

(f) Generally, refund or credit requests require verification by the department through a review of specific taxpayer records which have a bearing on the refund or credit request. If the refund or credit request relates to a year for which the statute of limitations will expire within a short period, the department may be able to more promptly issue a refund by delaying the verification process until it is more convenient to the taxpayer and/or the department if the taxpayer will execute a statute of limitations waiver.

(5) Interest on refunds or credits. Interest will be allowed on credits or refunds.

(a) Interest is paid at the rate of three percent per annum for refunds and credits of taxes or penalties which were paid by the taxpayer prior to January 1, 1992.

(b) For amounts overpaid by a taxpayer after December 31, 1991, the rate of interest on refunds and credits is the average of the federal short-term rate as defined in 26 U.S.C. Sec. 1274(d) plus one percentage point. The rate will be adjusted on the first day of January of each year by taking an arithmetical average to the nearest percentage point of the federal short-term rate, compounded annually, for the months January, April, July, and October of the immediately preceding calendar year as published by the United States Secretary of Treasury.

(c) The department will include interest on credit notices with the interest computed to the date the taxpayer could reasonably be expected to use the credit notice, generally the due date of the next tax return.

(d) If a taxpayer requests that a credit notice be converted to a refund, interest will be recomputed to the date the refund (warrant) is issued, but not to exceed the interest which would have been granted through the credit notice.

(6) Offsetting overpayments against deficiencies. The department may apply overpayments against existing deficiencies/assessments for the same legal entity. However, a potential deficiency which is yet to be determined will not be reason to delay the processing of an overpayment where an overpayment has been conclusively determined. The following examples illustrate the use of offsets:

(a) The taxpayer's records are audited for the period 1988 through 1991. The audit disclosed underpayments in 1989 and overpayments in 1991. The department will apply the overpayments in 1991 to the deficiencies in 1989. The resulting amount will indicate whether a refund or credit is owed the taxpayer or whether the taxpayer owes additional amounts.

(b) The department has determined that the taxpayer has overpaid its real estate excise tax in 1991. The department believes that the taxpayer may owe additional B&O taxes, but this has yet to be established. The department will not delay the processing of the refund of the real estate excise tax while it proceeds with scheduling and performing of an audit for the B&O taxes.

(c) The department simultaneously performed a timber tax audit and a B&O tax audit of a taxpayer. The department determined that the taxpayer underpaid its B&O tax and overpaid its timber tax. Separate assessments were issued on the same date, one showing additional taxes due and the other overpayments. The department may offset the overpayment against the tax deficiency assessment since both the underpayment and overpayment have been established.

[Statutory Authority: RCW 82.32.300, 93-04-077, § 458-20-229, filed 2/1/93, effective 3/4/93; 83-08-026 (Order ET 83-1), § 458-20-229, filed 3/30/83; Order ET 70-3, § 458-20-229 (Rule 229), filed 5/29/70, effective 7/1/70.]

# PROTECTIVE REFUND CLAIMS

Rev January 2006

309.00

## Protective Refund Claims

At the end of every year we receive last minute refund requests from taxpayers who believe they have a refund coming to them. They do not have all their information together yet and they don't want the statute of limitations to expire. In some cases, these requests are nothing more than a statement that the taxpayer "may" be entitled to a refund. These requests are considered protective refund claims.

Claims must be postmarked by the end of the year in order to be considered timely. If there is not a corresponding envelope or other evidence, examiners are to use their best judgment to determine timeliness. Examiners should try and be as taxpayer centric as the available evidence will allow due to the fact that we do not retain or have proof of late filing when we do not have a postmark. If uncertain about timeliness, examiners should seek guidance from their Tax Administration Manager (TAM).

Applications can be as basic as a notice of claim from the taxpayer to the Department. It does not have to contain all the information needed to review the refund at that time, simply enough information that the Department knows how to proceed (who to contact, general type of refund). However, we have a responsibility to promptly review requests for refund and should immediately request any detail information needed to actually review the refund.

## Time Limits

DOR is not required to wait once it has requested the information it needs to determine taxability or the amount of liability (including refunds). However, it is up to the examiner to request the information needed and the examiner must then set a time limit for the taxpayer to submit the requested information. Since no specific time limit is statutorily mandated, the examiner should set a reasonable period of time, depending on the circumstances. Working with the taxpayer in 30 or 60 day increments is a good starting point.

A letter must be drafted and sent to the taxpayer stating the protective refund claim request has been accepted. It should also clearly state a time frame and the consequences for not meeting the deadline. The consequences should include denial of their claim as being past statute, if the taxpayer fails to provide the needed information or show a good faith effort in providing it. (RCW 82.32.070 indicates that a taxpayer has a responsibility to provide any records necessary for the Department to verify or to determine the correct tax liability.)

The examiner can extend that period of time if the taxpayer is showing good faith in producing the required information. Additional letters, using the same guidelines above, need to be created and sent to the taxpayer for each extension of time.

Within reason, the examiner should continue to work with a taxpayer whose actions indicate cooperation and good faith intentions. If an examiner finds it necessary to deny a refund request due to some lack on the part of the taxpayer, the taxpayer may petition for an appeal. Examiners should discuss accounts with their TAM if they are uncertain about whether they should give additional extensions.

BEFORE THE INTERPRETATION AND APPEALS DIVISION  
DEPARTMENT OF REVENUE  
STATE OF WASHINGTON

In the Matter of the Petition ) D E T E R M I N A T I O N  
For Correction of Assessment and )  
Refund of ) No. 89-398  
)  
. . . . ) Registration No. . . .  
) . . . /Audit No. . . .  
)

- [1] RULE 193C: B&O TAX -- RETAIL SALES TAX -- DEDUCTION --EXPORTS -- FOREIGN BUYERS -- DELIVERY IN WASHINGTON. The mere issuance of documentation to Canadian customers to allow them to cross the U.S. - Canadian border without duty is not sufficient under Rule 193C to establish certainty of export.
- [2] RULE 118: RENTAL OF OR LICENSE TO USE REAL ESTATE -- PARKING -- TRACTORS AND TRAILERS. Because tractors and trailers are not "automobiles," service tax, and not retailing business and occupation tax and retail sales tax, is applicable if it is determined that designated parking spaces have not been rented for a continuous period of one month or more. In such a case there has been a license to use, and not the rental of real estate.
- [3] RULE 229 and RCW 82.32.060: REFUNDS -- CREDITS -- NONCLAIM PERIOD -- "EXAMINATION OF RECORDS" CONSTRUED. An "examination of records," as used in RCW 82.32.060 pertains solely to the audit function, and is complete when an assessment is issued.

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.

TAXPAYER REPRESENTED BY: . . . .

NATURE OF ACTION:

Petition concerning the taxability of hay sales to Canadian customers who accepted delivery in the state of Washington, the rental of parking space, and the nonclaim statute.

FACTS:

Bauer, A.L.J.-- The taxpayer's business records were examined for the period January 1, 1982 through December 31, 1985. As a result, the above-referenced assessment was issued on September 23, 1986 in the amount of \$ . . . , including interest. The taxpayer timely appealed. A supplemental audit was completed on February 4, 1988, which allowed credits in the total amount of \$ . . . for income which had been erroneously reported in the tax years 1984 and 1985. In the supplemental, the auditor disallowed any similar credits for tax years 1982 and 1983.

The taxpayer is a wholesaler and retailer of agricultural products - principally hay - and owns and operates thirteen truck/trailer sets. It not only deals in hay, but also arranges for backhauls (trucking) and rents space to generate additional revenue.

ISSUES AND TAXPAYER'S EXCEPTIONS:

1. Whether interstate and foreign sales deductions were properly disallowed when Canadian buyers took delivery in the State of Washington and then transported the goods to Canada on their own vehicles.

In addition to its commercial resale activity, the taxpayer operates a retail barn where farmers and individuals may buy smaller quantities of hay. The retail barn is located within two miles of the Canadian border, and makes many sales to Canadians. The auditor disallowed deductions for those sales wherein hay had been loaded onto foreign purchasers' vehicles at the retail barn, claiming that this was not sufficient evidence to indicate that the hay had entered the export stream.

The taxpayer argues that it gives these purchasers documentation to allow them cross the U.S. - Canadian border without duty (certain agricultural products are not normally allowed to cross the border without duty unless certain sales documentation is provided by the U.S. seller). The taxpayer claims that the auditor recognized that exportation probably occurred.

2. Whether the rental of space to park trucks and trailers is the nontaxable rental of real estate, or the taxable transfer of a license to use.

The taxpayer owns several acres of land on which its trucks and hay are stored. There is additional space, which the taxpayer has graded and covered with rock. The area is not enclosed by fence, but is surrounded by potato fields. This space is rented out to other trucking companies for the storage of their trucks and trailers. The auditor reasoned that payments received for the use of this space are not for the nontaxable rental of real estate, but income from the granting of a license to use the real estate (taxable under the service classification of the business and occupation tax).

The taxpayer claims that lessees are granted the right of control of certain designated areas for continuous periods under the terms of their leases. The lessees have specifically assigned areas, and pay rent on specific square footages. Each area is marked with a concrete marker; the tongues of trailers are apparently placed on the markers. The taxpayer claims that if a truck or trailer is incorrectly parked, then the taxpayer requires it be moved.

There are no written or signed leases for parking, and the taxpayer has supplied us with no invoices or other records of payment. Despite this lack of written documentation, the taxpayer claims that the rental periods are for thirty days or longer.

The taxpayer believes this is more than a mere license to use the real estate, and is therefore not taxable.

3. Whether RCW 82.32.060 precluded a refund for taxes erroneously paid in 1982 and 1983 in a supplemental audit during the year 1988, when the original audit completed in 1986 was still under appeal with the Department.

While waiting for a determination regarding its original appeal on the above issues, the taxpayer realized that it had incorrectly over-reported certain revenues. The taxpayer has claimed that the mistake was discovered and verified by its own personnel by December 28, 1987, and that the auditor was notified by telephone before the end of the calendar year. The auditor performed additional auditing procedures which resulted in substantial refunds to the taxpayer. However, he did not go back to 1982 and 1983, even though those years had been examined in the original audit, because it was his

judgement that the period for refunds and credits set forth in RCW 82.32.060, the nonclaim statute, had passed for those years.

4. Whether tax was properly imposed on an unreported interstate/foreign sale which was improperly entered on the taxpayer's books.

The taxpayer argues that one transaction reflected on Schedule II of the audit report was actually a foreign/interstate sale, in that the taxpayer drove to Vancouver, B.C., loaded clay targets (used for skeet shooting), and delivered them to Lewiston, Idaho. Errors were then made in both the sales journal and ledger. The taxpayer contends it has the documentation to establish the haul as foreign/interstate.

DISCUSSION:

The first issue in this appeal involves the assessment of tax on sales made to Canadian residents.

To be exempt as an export, goods must have entered the export stream with certainty of a foreign destination. Neither the intent to export, nor the fact the article ultimately reaches a foreign destination, is sufficient to invoke the immunity. Richfield Oil Corp. v. State Bd. of Equalization, 329 U.S. 69 (1946); Carrington Co. v. Dep't. of Revenue, 84 Wn.2d 444, 445 (1974). The test applied to determine whether goods have entered foreign commerce is one of "reasonable facility and certainty." Tacoma v. General Metals, 84 Wn.2d 560, 563 (1974).

WAC 458-20-193C (Rule 193C) is the administrative rule dealing with sales of goods from or to persons in foreign countries. The rule provides a deduction with respect to export sales as follows:

EXPORTS. A deduction is allowed with respect to export sales when as a necessary incident to the contract of sale the seller agrees to, and does deliver the goods (1) to the buyer at a foreign destination; or (2) to a carrier consigned to and for transportation to a foreign destination; or (3) to the buyer at shipside or aboard the buyer's vessel or other vehicle of transportation under circumstances where it is clear that the process of exportation of the goods has begun, and such exportation will not necessarily be deemed to have begun if the goods are merely in storage awaiting shipment, even though there is reasonable certainty that the goods will be exported. The intention to export, as evidenced for

example, by financial and contractual relationships does not indicate "certainty of export" if the goods have not commenced their journey abroad; there must be an actual entrance of the goods into the export stream.

In all circumstances there must be (a) a certainty of export and (b) the process of export must have started.

It is of no importance that title and/or possession of the goods pass in this state so long as delivery is made directly into the export channel. To be tax exempt upon export sales, the seller must document the fact that he placed the goods into the export process. That may be shown by the seller obtaining and keeping in his files any one of the following documentary evidence:

(1) A bona fide bill of lading in which the seller is shipper/consignor and by which the carrier agrees to transport the goods sold to the foreign buyer/consignee at a foreign destination; or

(2) A copy of the shipper's export declaration, showing that the seller was the exporter of the goods sold; or

(3) Documents consisting of:

(a) Purchase orders or contracts of sale which show that the seller is required to get the goods into the export stream, e.g., "f.a.s. vessel;" and

(b) Local delivery receipts, tripsheets, waybills, warehouse releases, etc., reflecting how and when the goods were delivered into the export stream; and

(c) When available, United States export or customs clearance documents showing that the goods were actually exported; and

(d) When available, records showing that the goods were packaged, numbered, or otherwise handled in a way which is exclusively attributable to goods for export.

Thus, where the seller actually delivers the goods into the export stream and retains such records as above set forth, the tax does not apply. It is not sufficient to show that the goods ultimately reached a foreign destination; but rather, the seller must show that he was required to, and did put the goods into the export process.

[1] Rule 193C thus lists three types of documentary evidence which a seller may use to document that he placed the goods into the export process. The taxpayer itself neither placed the goods into the export process, nor retained the necessary documents. The mere issuance of documentation to Canadian customers to allow them to cross the U.S. - Canadian border without duty is not sufficient under Rule 193C to establish certainty of export. The taxpayer's petition is denied as to this issue.

The second issue involves whether the rental of space for the parking of tractors and trailers is the nontaxable rental of real estate, or the taxable license to use.

Generally, automobile parking and storage garage businesses are subject to retailing business and occupation tax and retail sales tax unless designated parking spaces are rented for the exclusive use of each customer for a rental period of thirty days or more. RCW 82.04.050 and ETB 232.08.118.

[2] Because tractors and trailers are not "automobiles," however, service tax, and not retailing business and occupation tax and retail sales tax<sup>1</sup>, is applicable if it is determined that designated parking spaces have not been rented for a continuous period of one month or more. In such a case there has been a license to use, and not the rental of real estate.

Here, although the taxpayer has claimed that certain parking areas are delineated, and that tenants are charged by the square footage delineated for those areas for periods of one month or more, no evidence supporting this claim has been submitted other than the arguments of the taxpayer's representative.

The auditor, when on site, was unable to discern individual parking areas or even the concrete blocks described by the taxpayer. Office personnel, when asked by the auditor, indicated that "tenants" were instructed where to park only in general terms. Further, the taxpayer executes no lease agreements setting forth specific areas, and no invoices or billings have been submitted documenting either specified spaces/square footages or greater than thirty day occupancies of these areas.

---

<sup>1</sup> Only "automobile parking and storage garage businesses" are taxable as retail sales. RCW 82.04.050.

Accordingly, we must deny the taxpayer's petition as to this issue, and hold the rental of parking areas to be in the nature of a license to use and not the rental of real estate taxable under the service classification of the business and occupation tax.

We must similarly deny the taxpayer's petition for refund for taxes overpaid in 1982 and 1983. RCW 82.32.060, the nonclaim statute, reads in pertinent part as follows:

No refund or credit shall be made for taxes paid more than four years prior to the beginning of the calendar year in which the refund application is made or examination of records is completed.

WAC 458-20-229 (Rule 229) similarly provides:

If upon written application for a refund or an audit of his records, or upon examination of the returns or records of any taxpayer, it is determined by the department of revenue that within the four calendar years immediately preceding the completion by the department of such an examination, a tax has been paid in excess of that properly due, the excess amount paid within said period will be credited to the taxpayer's account or will be refunded to him.

No refund or credit may be made for taxes paid more than four years prior to the beginning of the calendar year in which refund application is made or examination of records by the department is completed.

Thus, the Department is without authority to grant a credit or refund attributable to time prior to the four calendar years preceding the year in which the taxpayer either requests a refund, or an examination of records by the department is completed.

Although the taxpayer claims it telephonically contacted the auditor before the end of calendar year 1987, the auditor's records indicate he was called no earlier than January 21, 1988. Because the taxpayer failed to make written application during calendar year 1987, we are constrained to accept the auditor's records as to the date of contact.

Four years prior to the beginning of 1988 includes calendar years 1987, 1986, 1985, and 1984. Calendar years 1983 and 1982 are outside of the four year window.

Further, calculating the refund from the date "the examination of records is completed" does not further the taxpayer's cause.

[3] An "examination of records," as used in RCW 82.32.060 pertains to the audit function. An "examination of records" is complete when an assessment is issued. Once an assessment is appealed under RCW 82.32.170, such latter review becomes an "examination of assessment."

The original "examination of records" was completed on September 23, 1986 the date the first assessment was issued. The overpayment had not been detected. The second "examination of records," which did address the overpayments, was completed on March 10, 1988. By virtue of RCW 82.32.060, refunds as a result of that examination could only be made for the prior four years - 1987, 1986, 1985, and 1984.

Generally, then, a request for refund or credit regarding an issue unrelated to those in a pending petition for correction of assessment or refund is subject to the four year nonclaim period set forth in RCW 82.32.060, even though other issues from the same audit period may still be pending with the Department in an appeal status.

Although this may at first blush seem a harsh result, it must be remembered that, had the auditor on his second examination detected additional underpayments for tax years 1982 and 1983, he would have been barred from issuing an another assessment by RCW 82.32.050, which provides in pertinent part:

No assessment or correction of an assessment for additional taxes due may be made by the department more than four years after the close of the tax year . . . .

The taxpayer's petition regarding this issue is denied.

The last issue involving the interstate/foreign sale which was improperly entered on the taxpayer's books is a factual matter which will be referred to the Audit Section.

#### DECISION AND DISPOSITION:

The taxpayer's petition for correction of assessment and refund is denied, except that the file will be referred to the Audit Division for possible adjustment in accordance with this Determination. An amended assessment will then be issued, payment of which will be due on the date indicated thereon.

DETERMINATION (Cont)  
No. 89-398

9

Registration No. . . .

DATED this 28th day of July 1989.