

TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	RESTATEMENT OF THE ISSUES.....	5
III.	STATEMENT OF THE CASE.....	5
	A. Relationship Between Tesoro Refining And Shell Oil Company.....	5
	B. Audit And Administrative Refund Claims.	7
	C. December 21, 2001 Petition For Administrative Review Of The Tax Assessment.....	9
	D. September 13, 2003 Petition for Administrative Review Of Post Audit Adjustment # 1.....	11
	E. Subsequent Procedural History.....	14
IV.	ARGUMENT.....	16
	A. Standard Of Review.....	16
	B. Tesoro Refining’s General Claim That It “Failed To Take The Export Deductions, Credits, And Other Exemptions Allowable Pursuant To WAC 458-20-252” Did Not Adequately Advise The Department Of The “Reasons Why” The Claim Should Be Granted As Required By RCW 82.32.170.	17
	1. Overview of the administrative refund process.....	17
	2. Tesoro Refining’s “failed to take the export deductions” claim did not provide adequate notice of the specific overpayments at issue as required by RCW 82.32.170.	21
	3. Tesoro Refining’s arguments are inconsistent with <i>Guy F. Atkinson Co. v. State</i>	26

4.	Rule 229 and the Department’s internal tax refund processing instructions do not support Tesoro Refining’s arguments.....	28
a.	Rule 229 does not support Tesoro Refining’s arguments.	30
b.	The Department’s internal tax refund processing instructions do not support Tesoro Refining’s arguments.	31
C.	Tesoro Refining’s “Failed To Take The Export Deductions” Refund Claim Could Not Be Amended Or Supplemented By New Grounds For Refund Identified After The Time Limit Set Out In RCW 82.32.060(1) Had Lapsed.	34
D.	The Second Sentence Of RCW 82.32.060(1), When Read In Context With The Statute As A Whole, Does Not Support Tesoro Refining’s Alternative Argument.....	38
V.	CONCLUSION	43

TABLE OF AUTHORITIES

Cases

<i>Barrie v. Hosts of Am., Inc.</i> , 94 Wn.2d 640, 618 P.2d 96 (1980)	16
<i>Computervision Corp. v. Untied States</i> , 445 F.3d 1355 (Fed. Cir. 2006)	24, 36
<i>Crystal v. United States</i> , 172 F.3d 1141 (9th Cir. 1999)	32
<i>Dep't of Ecology v. Campbell & Gwinn, L.L.C.</i> , 146 Wn.2d 1, 43 P.3d 4 (2002).....	40
<i>Guy F. Atkinson Co. v. State</i> , 66 Wn.2d 570, 403 P.2d 880 (1965).....	passim
<i>In re Estate of Wilson</i> , 8 Wn. App. 519, 507 P.2d 902 (1973).....	36
<i>Int'l Brotherhood of Elec. Workers, Local No. 46 v. Trig Elec. Constr. Co.</i> , 142 Wn.2d 431, 13 P.3d 622 (2000).....	17
<i>Joyce v. Dep't of Corr.</i> , 155 Wn.2d 306, 119 P.3d 825 (2005).....	32
<i>Lane v. Dep't of Labor & Indus.</i> , 21 Wn.2d 420, 151 P.2d 440 (1944).....	18
<i>Mayflower Park Hotel v. Dep't of Revenue</i> , 123 Wn. App. 628, 98 P.3d 534 (2004).....	30
<i>Miller v. Campbell</i> , 164 Wn.2d 529, 192 P.3d 352 (2008).....	35
<i>Paccar, Inc. v. Dep't of Revenue</i> , 135 Wn.2d 301, 957 P.2d 669 (1998).....	passim

<i>Paccar, Inc. v. Dep't of Revenue,</i> 85 Wn. App. 48, 930 P.2d 954 (1997).....	17
<i>Pittock & Leadbetter Lumber Co. v. Skamania Cy.,</i> 98 Wash. 145, 167 P. 108 (1917)	19
<i>Redding v. Virginia Mason Med. Ctr.,</i> 75 Wn. App. 424, 878 P.2d 483 (1994).....	17
<i>Seiber v. Poulsbo Marine Center, Inc.,</i> 136 Wn. App. 731, 150 P.3d 633 (2007).....	16
<i>Simpson Inv. Co. v. Dep't of Revenue,</i> 141 Wn.2d 139, 3 P.3d 741 (2000).....	16
<i>State v. J.P.,</i> 149 Wn.2d 444, 69 P.3d 318 (2003).....	38
<i>United States v. Felt & Tarrant Mfg. Co.,</i> 283 U.S. 269, 51 S. Ct. 376, 75 L. Ed. 1025 (1931).....	2, 20
<i>Van Dyk v. Department of Revenue,</i> 135 Wn.2d 301, 957 P.2d 669 (1998).....	17
<i>Van Dyk v. Department of Revenue,</i> 41 Wn. App. 71, 702 P.2d 472 (1985).....	17

Statutes

RCW 82.21.040	24
RCW 82.21.040(1).....	13
RCW 82.21.050	24
RCW 82.21.050(1).....	13
RCW 82.32.050(4).....	21
RCW 82.32.060	passim

RCW 82.32.060(1).....	passim
RCW 82.32.060(2).....	17, 31
RCW 82.32.060(2)(a)	19
RCW 82.32.160	passim
RCW 82.32.170	passim
RCW 82.32.180	2, 15, 17, 20
RCW 82.32A.030(6).....	21

Regulations

WAC 458-20-229.....	28, 29, 30, 31
WAC 458-20-229(4)(d) (2007).....	30
WAC 458-20-229(4)(f) (2007)	30, 31
WAC 458-20-252.....	24
WAC 458-20-252(4).....	24
WAC 458-20-252(5).....	24

Rules

CR 15(c).....	35
---------------	----

Treatises

15 Mertens Law of Federal Income Taxation § 58:37 (Supp. 2010).....	37
---	----

I. INTRODUCTION

This is an excise tax refund action that centers on the requirements for filing an administrative refund claim under RCW 82.32.060 and .170. RCW 82.32.060 establishes the time limit for filing an application for refund of excise taxes, and RCW 82.32.170 establishes the other statutory requirements for a valid refund application. The central issue in this appeal is whether the company now known as Tesoro Refining and Marketing Company (“Tesoro Refining”) filed a refund application that complied with the requirements of RCW 82.32.060 and .170 with respect to certain hazardous substance taxes the company paid in 1996 through 1998. The Department of Revenue (“Department”) submits that the undisputed facts show that Tesoro Refining did not timely apply for a refund of the taxes at issue, and that the superior court correctly awarded summary judgment to the Department.

If a taxpayer seeks a refund from the Department, the application must comply with RCW 82.32.170. That section provides in relevant part:

Any person, having paid 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. . . .

RCW 82.32.170 requires a taxpayer to submit a written application for refund setting forth the grounds for, and the amount of, the claim. In this respect RCW 82.32.170 (relating to administrative refund claims) closely parallels RCW 82.32.160 (relating to administrative review of tax deficiency assessments) and RCW 82.32.180 (relating to refund claims filed in superior court). All three provisions require a written statement of the reasons for the relief being sought. *See* RCW 82.32.160 (“The petition [for administrative review of a tax deficiency assessment] shall set forth the reasons why the correction should be granted”); RCW 82.32.170 (the application for refund “shall set forth the reasons why the conference [for examination and review of the tax liability] should be granted”); RCW 82.32.180 (in a suit for refund “the taxpayer shall set forth . . . the reasons why the tax should be reduced or abated.”). As noted by the United States Supreme Court in *United States v. Felt & Tarrant Mfg. Co.*, 283 U.S. 269, 51 S. Ct. 376, 75 L. Ed. 1025 (1931), one of the primary reasons for these types of notice provisions “is to advise the appropriate officials of the demands or claims intended to be asserted, so as to insure an orderly administration of the revenue.” *Id.* at 272.

In the present case, Tesoro Refining (then known as Shell Anacortes Refining Company) filed an administrative appeal petition with the Department in September 2003 that included a specific request for

refund of hazardous substance tax the company overpaid in 1996 through 1998. The Department determined that the refund claim was untimely and could only be allowed as an offset against a tax deficiency assessment issued to Tesoro Refining in December 2001. The offset was allowed as required by *Paccar, Inc. v. Dep't of Revenue*, 135 Wn.2d 301, 957 P.2d 669 (1998).¹ The balance of Tesoro Refining's September 2003 refund claim was denied.

Tesoro Refining, along with Shell Oil Company, filed a joint appeal and petition for refund in superior court. In that appeal, the Appellants argued that Tesoro Refining was not limited to an offset against the tax assessment. Rather, Appellants argued that an administrative appeal petition filed by Tesoro Refining in December 2001—which included a vague claim that during the 1996 through 1998 tax periods Tesoro Refining “failed to take the export deductions, credits, and other exemptions allowable pursuant to WAC 458-20-252”—was sufficient to allow a refund of the overpayments at issue even though those

¹ In *Paccar*, the Washington Supreme Court held that a refund claim filed more than four years after the close of a tax period is still timely under RCW 82.32.060 with respect to a tax deficiency assessment covering that tax period where the tax assessment was paid within four years from the beginning of the calendar year in which the refund application was made. However, the refund is limited to the amount of the tax assessment actually paid within the statutory time limit. Any overpayments in excess of the assessment amount are not refundable.

overpayments were not specifically identified until September 2003. The superior court disagreed and upheld the Department's determination.

The trial court's order granting the Department's motion for summary judgment was correct as a matter of law. Tesoro Refining's vague "failed to take the export deductions" refund claim included in its December 2001 administrative appeal petition did not adequately notify the Department of the grounds for refund of the overpayments at issue in this case and was properly denied. Moreover, the September 2003 administrative appeal petition, in which the specific overpayments at issue were first identified, was filed after the time limit established in RCW 82.32.060 had lapsed. Finally, Tesoro Refining's untimely September 2003 administrative appeal petition does not "relate back" to its vague December 2001 appeal petition. *See Guy F. Atkinson Co. v. State*, 66 Wn.2d 570, 403 P.2d 880 (1965) (rejecting a similar argument). Tesoro Refining cites no relevant authority supporting its contention that a vague or general refund claim, which does not "set forth the reasons" for refund of the specific taxes at issue, can be cured or amended by a later, untimely, refund claim.

The superior court correctly rejected Appellants' arguments and awarded summary judgment in favor of the Department. This Court should affirm the superior court's order.

II. RESTATEMENT OF THE ISSUES

In light of the statutory requirements set out in RCW 82.32.060 and .170, the Court is asked to decide three issues:

1. Whether Tesoro Refining's general claim that it "failed to take the export deductions, credits, and other exemptions allowable pursuant to WAC 458-20-252" adequately advised the Department of the "reasons why" the claim should be granted as required by RCW 82.32.170.
2. Whether Tesoro Refining's "failed to take the export deductions" refund claim could be "amended" or "supplemented" by new grounds for refund identified after the time limit set out in RCW 82.32.060 had lapsed.
3. Whether the second sentence of RCW 82.32.060(1), when read in context with the statute as a whole, supports Tesoro Refining's alternative argument that it is entitled to a refund of overpayments made during 1997 and 1998.

III. STATEMENT OF THE CASE

A. Relationship Between Tesoro Refining And Shell Oil Company.

In 1996 Shell Oil Company formed a subsidiary corporation to operate a crude oil refining plant in Skagit County, Washington. CP 202. The subsidiary corporation was initially known as "Shell Anacortes

Refining Company.” *Id.* In May 1998 Shell Oil Company (through another subsidiary, Shell Refining Holding Company) sold all of its shares of Shell Anacortes Refining Company to Tesoro Petroleum Corporation. *Id.* Sometime after the stock sale was completed, Shell Anacortes Refining Company changed its name to “Tesoro West Coast Company” and later to “Tesoro Refining and Marketing Company.” CP 505-06.

There is no dispute that Shell Oil Company and Tesoro Refining are separate legal entities and that the hazardous substance tax at issue in this case was paid by Tesoro Refining. CP 6. However, when Shell Oil Company sold its interest in Tesoro Refining, the parties to the transaction agreed that Shell would be entitled to any Washington excise tax refund payable to Tesoro Refining for “Pre-Closing Periods.” CP 205. This is the only reason Shell Oil Company is listed as a plaintiff in this tax refund action. CP 6 (“Shell Oil Company is contractually entitled to any Washington State tax refunds available to [Tesoro Refining] applicable to 1996 through 1998.”). The underlying dispute centers on administrative refund claims filed by Tesoro Refining, not Shell Oil Company.²

² The Department is aware that the Appellants have decided to refer to themselves “collectively as ‘Shell’” in this appeal. Appellants’ Br. at 1 n.1. However, Tesoro Refining and Shell Oil Company are separate legal entities, and the underlying facts of this case pertain to Tesoro Refining, not Shell Oil Company. To avoid confusing Tesoro Refining with Shell Oil Company, the Department will refer to the Appellants collectively as “Appellants” or, in the singular, as “Tesoro Refining.”

B. Audit And Administrative Refund Claims.

In September 1999 the Department notified Tesoro Refining (then known as Shell Anacortes Refining Company) that the Department would be conducting a routine excise tax audit of Tesoro Refining’s Washington combined excise tax returns covering the April 1996 through December 1997 reporting periods. CP 235. The audit was later extended to cover the April 1996 through July 1998 reporting periods.

Before the audit was completed, Tesoro Refining and the Department executed a “Statute of Limitations Waiver Agreement” relating to the April through December 1996 reporting periods. CP 239. The Waiver Agreement (1) extended the period within which the Department could assess Tesoro Refining for additional excise taxes, and (2) extended the period within which Tesoro Refining could apply for refund or credit of overpaid excise taxes. As a result of the Waiver Agreement, the statutory period for assessing additional excise taxes or applying for a refund of excise taxes expired on the following dates:

Tax Period	Expiration Date
4/1/96 – 12/31/96	12/31/01 [as a result of Waiver Agreement]
1/1/97 – 12/31/97	12/31/01
1/1/98 – 7/31/98	12/31/02

On December 21, 2000, Tesoro Refining submitted the first of several applications for refund of excise taxes—including hazardous substance taxes—paid during the April 1996 through December 1998 tax periods. CP 241-45. Over the next few months, Tesoro Refining submitted three other applications seeking a refund of hazardous substance tax paid during 1996 through 1998. CP 247-48 (January 23, 2001 application); CP 250-54 (February 21, 2001 application); CP 256-258 (July 6, 2001 application). All four applications for refund were reviewed by the Department’s Audit Division as part of the on-going audit of Tesoro Refining’s April 1996 through July 1998 excise tax returns.

On December 4, 2001, after the conclusion of the audit, the Department issued a tax deficiency assessment to Tesoro Refining in the amount of \$1,478,450 plus interest. CP 260. In the “Auditor’s Detail of Differences” relating to the December 4, 2001 assessment notice, the Audit Division explained the reasons for the tax deficiency and also addressed the various claims raised by Tesoro Refining in its four refund applications. CP 330-39. The Audit Division granted two of Tesoro Refining’s claims relating to overpaid hazardous substance tax. CP 338 (“Credit has been given in [Audit] Schedule 15 for fuel-in-tank deductions not taken on your returns.”); CP 338 (“Based on the record provided, the appropriate credit has been given in Schedule 17” for hazardous substance

tax paid on exempt crude oil products.). However, no refund or credit was allowed for any of the other hazardous substance tax refund claims included in Tesoro Refining's various refund applications.

On December 13, 2001, shortly after the tax assessment notice was issued, Tesoro Refining filed an "amended" application for refund covering the April 1996 through December 1998 tax periods. CP 341-47. In its "amended" application Tesoro Refining asserted, among other things, that it had "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." CP 345. The December 13, 2001 "amended" application for refund was reviewed by the Department's Audit Division in conjunction with the administrative appeal proceedings described below.

C. December 21, 2001 Petition For Administrative Review Of The Tax Assessment.

On December 21, 2001, shortly after filing its "amended" refund application, Tesoro Refining filed a petition for administrative review of the December 4, 2001 tax assessment. CP 349-55.³ See RCW 82.32.160 (authorizing administrative review of "a notice of additional taxes . . .

³ The author of the December 21, 2001 petition for administrative review inadvertently failed to update the document header, resulting in an incorrect date listed at the top of pages 2 through 7 of the petition.

assessed by the department.”).⁴ The petition for administrative review was almost identical to the “amended” application for refund. *Compare* CP 341-47 (“amended” application for refund) *with* CP 349-55 (petition for administrative review). Like the “amended” application for refund, the December 21, 2001 petition for administrative review asserted, among other things, that Tesoro Refining “failed to take the export deductions, credits, and other exemptions allowable pursuant to WAC 458-20-252.” CP 353. No further explanation or documentation supporting the “failed to take the export deductions” claim was provided with the petition.

The December 21, 2001 petition for administrative review was sent to the Department’s Audit Division to review additional information and records to be provided by Tesoro Refining. During this review process, which took over eighteen months to complete, Tesoro Refining provided no explanation and no documents to support its claim that it had “failed to take the export deductions, credits, and other exemptions allowable pursuant to WAC 458-20-252.” Tesoro Refining did, however, provide documents supporting other more specific claims. *See generally* CP 411-

⁴ It appears that Tesoro Refining considered its September 21, 2001 letter to qualify as both a petition for administrative review of the audit assessment under RCW 82.32.160 and as a refund application under RCW 82.32.170. *See* CP 349 (Tesoro Refining refers to the letter as “Re: Appeal of Assessment and Request for Refund.”). The Department does not object to this “dual” purpose for the letter. However, for consistency the Department will refer to the letter as a “petition for administrative review,” not an application for refund.

14 (“Auditor’s Detail of Differences” discussing credits and adjustments allowed).

D. September 13, 2003 Petition for Administrative Review Of Post Audit Adjustment # 1.

In August 2003, after reviewing the additional materials provided by Tesoro Refining in support of its administrative appeal, the Audit Division issued a post assessment adjustment to the December 4, 2001 tax deficiency assessment. CP 357-409. The post assessment adjustment (“PAA # 1”) reduced the December 4, 2001 tax deficiency assessment by \$981,171 plus interest, CP 358, resulting in a revised assessment of \$497,279 plus interest. CP 357.

The “Auditor’s Detail of Differences” relating to PAA # 1 addressed the various claims for credit or refund that had been submitted by Tesoro Refining. CP 411-14. Several of the claims were granted. For example, the Audit Division allowed Tesoro Refining credit for B&O taxes paid on catalytic coke, and a credit for hazardous substance tax paid on sales of jet fuel covered by valid fuel-in-tank certificates. *See* CP 411-12 (describing credits allowed and other adjustments made to the tax deficiency assessment). However, Tesoro Refining’s “failed to take the export deductions” claim was denied. CP 413 (“Other than credits given

above, taxpayer hasn't provided documents showing where further adjustment is required.”).

On September 12, 2003, Tesoro Refining filed a petition for administrative review of PAA # 1. CP 416-22. The September 12, 2003 petition was timely filed under RCW 82.32.160 which relates to the requirements for filing an administrative appeal of a tax assessment. However, the petition was filed after the expiration of the statutory period set out in RCW 82.32.060 for claiming a refund of excise taxes paid during 1996 through 1998.

In its September 12, 2003 petition for administrative review, Tesoro Refining raised the following new grounds for refund of hazardous substance tax:

Schedule 3 - Additional credit is due for hazardous substance taxes paid on truck/rail exchange receipts, on in state purchases. . . .

Schedule 4 - Additional credit is due for hazardous substance taxes paid on Pipeline/Marine Terminal product purchases, on in state purchases. . . .

Schedule 5 - Additional credit is due for hazardous substance taxes paid on Pipeline/Marine Terminal exchange receipts, on in state purchases. . . .

. . . .

Schedule 9 - In determining the In-Tank Credits, Shell' [sic] representative, Price Waterhouse Coopers, only calculated the credits associated with jet fuel. Other In-Tank Credits were omitted. A schedule detailing such additional

credits will be provided to the field auditor in the near future. . . .

CP 417-18. Tesoro Refining later clarified that the first three items (identified by Tesoro Refining as “Schedule 3” through “Schedule 5”) related to previously taxed hazardous substances that Tesoro Refining should have excluded from the hazardous substance tax base under RCW 82.21.040(1). CP 500. The fourth item (identified as “Schedule 9”) related to the “fuel-in-tank” credit authorized under RCW 82.21.050(1). CP 502.

The administrative appeal of PAA # 1 was remanded to the Audit Division to consider additional information and records to be provided by Tesoro Refining. CP 424-26. Sometime thereafter, Tesoro Refining submitted documents to support its petition.

On July 8, 2005, the Audit Division issued a second post assessment adjustment. CP 428-463. The second post assessment adjustment (“PAA # 2”) reduced the excise tax assessment by another \$134,561 plus interest, CP 429, resulting in a revised assessment of \$362,718 plus interest. CP 428. The “Auditor’s Detail of Differences” relating to PAA # 2 addressed the arguments raised by Tesoro Refining in its September 12, 2003 petition for administrative review. CP 465-66. The Audit Division denied each of the four new grounds for refund Tesoro Refining raised in its

petition. According to the Audit Division, no refund or credit was allowed on these new grounds “due to the fact that the statute of limitations for refunds of tax paid on the subject tax returns has expired prior to the date of your request.” CP 465-66.

E. Subsequent Procedural History.

On August 5, 2005, Tesoro Refining filed a petition for administrative review of PAA # 2, arguing that its new grounds for refund should be treated as timely filed. CP 472-76. The Department disagreed and on April 23, 2007, issued Determination No. 07-0105 holding that the new grounds for refund raised by Tesoro Refining in its September 12, 2003 petition were time barred under RCW 82.32.060. CP 505-512. However, under the holding of *Paccar, Inc. v. Dep’t of Revenue*, 135 Wn.2d 301, 957 P.2d 669 (1998), Tesoro Refining was allowed an offset for its untimely refund claim up to the amount of the taxes assessed by the Department in the audit. CP 511. The matter was remanded to the Audit Division for verification of records and computation of the credit allowed under the *Paccar* decision.

On January 15, 2008, the Audit Division issued a third post assessment adjustment (“PAA # 3”). CP 514-29. PAA # 3 reduced the excise tax assessment by \$362,718 plus interest as a result of the offset allowed under *Paccar*, CP 515, bringing the total amount assessed in the

audit to \$-0-. CP 514. The remaining portion of the refund claimed by Tesoro Refining in its September 12, 2003 petition for administrative review was denied as time barred. CP 532.

On February 7, 2008, Tesoro Refining filed a petition for administrative review of PAA # 3. CP 534-38. In its petition, Tesoro Refining sought a refund of the full amount claimed in its September 12, 2003 petition, less the credit already allowed in PAA # 3.

The Department denied Tesoro Refining's petition for administrative review of PAA # 3. CP 543-551. The Department again determined that the new grounds for refund raised by Tesoro Refining in its September 12, 2003 petition were time barred under RCW 82.32.060 and could be allowed only as an offset against the tax deficiency assessment. CP 548.

Pursuant to RCW 82.32.180, Tesoro Refining filed a de novo refund action in Thurston County Superior Court seeking a refund of the disallowed portion of its September 12, 2003, refund claim. CP 5-9. The parties filed cross-motions for summary judgment. The superior court granted the Department's motion and denied Tesoro Refining's cross-motion. CP 648-650. This appeal followed.

IV. ARGUMENT

A. Standard Of Review.

This appeal stems from the grant of summary judgment in favor of the Department of Revenue on cross-motions for summary judgment. The Court of Appeals reviews a grant of summary judgment de novo, using the same standard used by the lower court in ruling on the motion. *Seiber v. Poulsbo Marine Center, Inc.*, 136 Wn. App. 731, 736, 150 P.3d 633 (2007). Summary judgment is appropriate when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. CR 56. A “material fact” is one upon which the outcome of the litigation depends, in whole or in part. *Barrie v. Hosts of Am., Inc.*, 94 Wn.2d 640, 642, 618 P.2d 96 (1980).

The material facts supporting the Department’s motion for summary judgment were not disputed. CP 605. When the material facts in an excise tax refund action are undisputed and the only issues to be resolved are legal in nature, the appellate court reviews the legal conclusions de novo. *Simpson Inv. Co. v. Dep’t of Revenue*, 141 Wn.2d 139, 148, 3 P.3d 741 (2000). Moreover, the appellate court may affirm the summary judgment order on any basis supported by the record. *See Int’l Brotherhood of Elec. Workers, Local No. 46 v. Trig Elec. Constr. Co.*, 142

Wn.2d 431, 435, 13 P.3d 622 (2000); *Redding v. Virginia Mason Med.*

Ctr., 75 Wn. App. 424, 426, 878 P.2d 483 (1994).

B. Tesoro Refining’s General Claim That It “Failed To Take The Export Deductions, Credits, And Other Exemptions Allowable Pursuant To WAC 458-20-252” Did Not Adequately Advise The Department Of The “Reasons Why” The Claim Should Be Granted As Required By RCW 82.32.170.

1. Overview of the administrative refund process.

This case involves the requirements that must be met before the Department is authorized to refund an overpayment of excise taxes.⁵

Those requirements are specified in RCW 82.32.060 and RCW 82.32.170.⁶

The time limit for claiming an excise tax refund is set out in RCW 82.32.060(1) and (2), which provide in relevant part as follows:

(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

⁵ A taxpayer can bypass the administrative refund process and, instead, seek a refund by filing an action in Thurston County Superior Court under RCW 82.32.180. “When the taxpayer files a suit in superior court rather than exhausting administrative remedies, the refund application is considered made under the statute as of the date the court action is filed, not the date the refund petition is submitted to the agency.” *Paccar, Inc. v. Dep’t of Revenue*, 85 Wn. App. 48, 55, 930 P.2d 954 (1997) (citing *Van Dyk v. Department of Revenue*, 41 Wn. App. 71, 77, 702 P.2d 472 (1985)), *rev’d on other grounds*, 135 Wn.2d 301, 957 P.2d 669 (1998).

⁶ A copy of RCW 82.32.060 is attached as Appendix A. A copy of RCW 82.32.170 is attached as Appendix B.

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.

(Emphasis added).

RCW 82.32.060 is a nonclaim statute. *Guy F. Atkinson Co. v. State*, 66 Wn.2d 570, 572, 403 P.2d 880 (1965). It “designates the time allowed for the taking of a step which is a prerequisite to the bringing of an action” and establishes “the power of the [Department of Revenue] to make a refund and the conditions under which it may be made.” *Id.* See generally *Lane v. Dep’t of Labor & Indus.*, 21 Wn.2d 420, 425-26, 151 P.2d 440 (1944) (discussing difference between a nonclaim statute and a statute of limitations). Moreover, “[s]ince a right has been granted . . . to recover an overpayment of tax, the right must be exercised in the manner provided by the statute.” *Guy F. Atkinson*, 66 Wn.2d at 575. This is consistent with the well-established principle that taxes voluntarily but erroneously paid cannot be refunded absent specific statutory authority.

Pittock & Leadbetter Lumber Co. v. Skamania Cy., 98 Wash. 145, 147, 167 P. 108 (1917).

Under RCW 82.32.060, there are only two situations in which the Department is allowed to refund overpaid taxes. *Guy F. Atkinson*, 66 Wn. 2d at 573. The first is when a taxpayer makes an application for a refund or for an audit of its records. *Id.* at 573-74. The second is when the Department uncovers an overpayment during an examination of the taxpayer's returns or records. *Id.* at 574. In the first instance (i.e., when the taxpayer initiates the refund by filing a timely application), a refund is allowed only for taxes, penalties, or interest paid within four years prior to the beginning of the calendar year in which the refund application is made. In the second instance (when the Department uncovers the overpayment in an audit), a refund is allowed only for taxes, penalties, or interest paid within four years prior to the beginning of the calendar year in which the examination of records is completed.

RCW 82.32.060(2)(a) allows the Department to enter into a written agreement with a taxpayer extending the time within which the Department can assess additional taxes and the time within which a taxpayer can file an application for refund. Absent a written waiver agreement, a taxpayer must file its application for refund within the time limitation set out in RCW 82.32.060(1).

In addition to the time limit set out in RCW 82.32.060, an application for refund filed with the Department must also comply with RCW 82.32.170. That section provides in relevant part:

Any person, having paid 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. . . .

As noted in the “Introduction” section of this brief, RCW 82.32.170 requires a taxpayer to submit a written application for refund setting forth the grounds for, and the amount of, the claim. This basic notice requirement is consistent with the notice requirements set out in RCW 82.32.160 (relating to administrative review of tax deficiency assessments) and RCW 82.32.180 (relating to refund claims filed in superior court). One of the primary reasons for requiring written notice of the relief being claimed “is to advise the appropriate officials of the demands or claims intended to be asserted, so as to insure an orderly administration of the revenue.” *United States v. Felt & Tarrant Mfg. Co.*, 283 U.S. 269, 272, 51 S. Ct. 376, 75 L. Ed. 1025 (1931).

Upon receipt of a valid application for refund, the Department is authorized to grant the refund only if it determines “that within the

statutory period for assessment of taxes, penalties, or interest prescribed by RCW 82.32.050” there has been an overpayment. RCW 82.32.060(1). The “statutory period for assessment of taxes . . . prescribed by RCW 82.32.050” is normally four-years from the close of the tax year. RCW 82.32.050(4). In effect, the time limit relating to a refund or credit of an overpayment is the same as the time limit for assessing additional taxes.⁷

Once a taxpayer has filed a timely refund application meeting the requirements of RCW 82.32.170, the taxpayer has an obligation to substantiate its claim. RCW 82.32A.030(6) (taxpayers have the responsibility to “[s]ubstantiate claims for refund.”). If a taxpayer fails to substantiate the claim, the claim will be denied.

2. Tesoro Refining’s “failed to take the export deductions” claim did not provide adequate notice of the specific overpayments at issue as required by RCW 82.32.170.

One of the express limitations contained in RCW 82.32.060 is that, except where the time for filing has been extended by written agreement, “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” RCW 82.32.060(1) (second sentence). In the present case,

⁷ There is, however, one important difference between the time limit for assessing additional taxes and the time limit for seeking a refund. The limitation period for assessing additional taxes under RCW 82.32.050(4) begins to run on “the close of the tax year,” while the limitation period for seeking a refund under RCW 82.32.060(1) begins to run from the date the tax is paid. Thus, the date on which the time limit begins to run is not the same under RCW 82.32.050(4) and RCW 82.32.060(1).

there is no dispute that the four specific grounds for refund identified by Tesoro Refining in its September 12, 2003 petition for administrative review of PAA # 1 were untimely since the petition was filed after the four year period specified in RCW 82.32.060(1) had lapsed.

Tesoro Refining does not argue that its September 12, 2003 petition for administrative review of PAA #1 qualifies as a timely refund application. Instead, Tesoro Refining claims that it filed an application for refund of the hazardous substance tax at issue “[o]n or before December 31, 2001.” CP 6 (Complaint, ¶ 7). More specifically, Tesoro Refining is relying on its December 21, 2001 petition for administrative review as the “timely” refund application. *See* Appellants’ Br. at 9 (“The December 21, 2001 refund application was sufficient to support a refund for the \$1,194,926 remaining overpayment . . .”). It is not clear why Tesoro Refining relies on its December 21, 2001 administrative appeal petition filed under RCW 82.32.160 rather than its December 13, 2001 “amended” application for refund filed under RCW 82.32.170. *See* Appellants’ Br. at 5 (stating that the “December 13, 2001” application for refund is “not at issue.”). Tesoro Refining does not explain this apparent tactical decision in its Appellants’ Brief. In any event, to the extent the December 21, 2001

administrative appeal petition also contained an application for refund, the requirements set out in RCW 82.32.060 and .170 must still be met.⁸

To obtain a refund of excise taxes paid in error, the taxpayer must, at a minimum, put the Department on notice of the grounds for the refund and the amount to be refunded. This notification requirement is expressly set out in RCW 82.32.170. That code section provides in relevant part that an application for refund must be in writing, must petition the Department for a correction of the amount paid and for a conference for examination and review of the tax owed, and “**shall set forth the reasons why** the conference should be granted, and the amount in which the tax, interest, or penalty, should be refunded.” (Emphasis added). This basic notice requirement serves to apprise the Department of the legal and factual nature of the tax refund claim so the Department can make an informed and expedient decision.⁹ Because the Department of Revenue is not required to ferret out every possible ground for refund that a taxpayer might assert, the responsibility is clearly on the taxpayer to identify and support its claim for refund. RCW 82.32.170. *See generally United States*

⁸ See footnote 4 discussing the apparent dual purpose of Tesoro Refining’s September 21, 2001 petition for administrative review.

⁹ This basic notice requirement is also inherent in the language of RCW 82.32.060(1), which specifies that upon receipt of a timely refund application the Department must determine the amount of tax, penalty or interest that has been paid in excess of the amount properly due. The Department will be unable to make a reasonable determination of the amount of any overpayment if the taxpayer does not timely notify the Department of the specific grounds supporting the refund claim.

v. Felt & Tarrant Mfg. Co., 283 U.S. 269, 272, 51 S. Ct. 376, 75 L. Ed. 1025 (1931) (describing general purpose for requiring written notification of grounds for refund); *Computervision Corp. v. United States*, 445 F.3d 1355, 1363 (Fed. Cir. 2006) (“The requirement for filing a proper refund claim is designed both to prevent surprise and to give adequate notice to the Service of the nature of the claim and the specific facts upon which it is predicated, thereby permitting an administrative investigation and determination.”) (Internal quotations and citation omitted).

Tesoro Refining’s December 21, 2001 petition for administrative review of the audit assessment did not put the Department on notice of the specific overpayments first identified in Tesoro Refining’s September 12, 2003 letter. Tesoro Refining simply claimed it “failed to take the export deductions, credits, and other exemptions allowable pursuant to WAC 458-20-252.” CP 353. Without more, this explanation is not helpful. The hazardous substance tax chapter contains several different exemptions and credits. *See* RCW 82.21.040 (listing exemptions) and .050 (listing credits). WAC 458-20-252, which relates to the hazardous substance tax, describes and categorizes the various exemptions and credits. *See* WAC 458-20-252(4) (describing exemptions) and -252(5) (describing credits). Tesoro Refining makes no effort to explain which exemptions or credits apply or why.

At best, the December 21, 2001 petition informed the Department that Tesoro Refining might have neglected to claim credits or exemptions it was entitled to. But that is always the case. It is always possible that a taxpayer may have overlooked tax exemptions or other tax benefits that were available. Informing the Department that it may have neglected to claim unspecified deductions or credits is not the same as setting out in writing “the reasons why the conference should be granted, and the amount in which the tax, interest, or penalty, should be refunded.” RCW 82.32.170 (first sentence). This is particularly true where, as here, the grounds for the refund are not obvious.

In a footnote, Tesoro Refining asks the Court to overlook the express requirements of RCW 82.32.170. Appellants’ Br. at 12 n.5. The Court should decline this request not only because it would ignore the plain and mandatory language of the statute, but it would also hinder the Department’s ability to “promptly consider the petition” and make an informed decision whether to grant or deny it. RCW 82.32.170 (second sentence). Because Tesoro Refining’s December 21, 2001 petition for administrative review did not identify or minimally address the specific overpayments at issue in this case, it cannot qualify as a timely claim for refund of those overpayments.

3. Tesoro Refining's arguments are inconsistent with *Guy F. Atkinson Co. v. State*.

Because Tesoro Refining's December 21, 2001 appeal petition did not address the specific overpayments at issue in this case, it cannot qualify as a timely claim for refund of those overpayments. This is settled law. In *Guy F. Atkinson Co. v. State*, 66 Wn. 2d 570, 403 P.2d 880 (1965), two construction companies operating as a joint venture sought a refund of excise taxes paid during 1953 through 1957 on the construction of a dam. *Id.* at 571. The refund claim was filed with the "Tax Commission" (now the Department of Revenue) in 1961 and was denied as untimely under the then two-year nonclaim statute. *Id.* at 571-72. The taxpayers appealed to the superior court, which reversed and ordered the Tax Commission to refund the overpaid taxes. *Id.* at 572. In the ensuing appeal to the Washington Supreme Court, the taxpayers raised several arguments "to the effect that RCW 82.32.060 does not bar their [refund] action." *Id.* at 575. None of the taxpayers' arguments were accepted, and the judgment of the trial court was reversed.

One of the arguments advanced by the taxpayers was that their refund application was timely because they had previously filed four administrative refund applications during 1956 and 1957 that were received by the Tax Commission within two years from the payment of

the taxes at issue. *Id.* at 577. In effect, the taxpayers asserted that the refund application they filed in 1961 somehow related back to timely refund applications they filed in 1956 and 1957. In rejecting this argument, the Washington Supreme Court held that the refund applications filed in 1956 and 1957 “were only for the particular taxes described therein and were ineffective as to any others.” *Id.*

Although the Court in *Guy F. Atkinson* did not cite any authority for its holding that the timely filed administrative refund applications “were only for the particular taxes described therein and ineffective as to any others,” the holding is certainly consistent with the notice requirement established by the Legislature in RCW 82.32.170. Moreover, while the timely refund claims in *Guy F. Atkinson* were specific and set out the “amount claimed and the reasons for the claim,” nothing in the holding of the case suggests that the result would be different had the taxpayers filed a general or vague refund claim. Under Tesoro Refining’s analysis—in which a general or vague refund claim keeps the time limitation open—a taxpayer is actually penalized for providing clear and specific information to the Department in its refund claim. This result is not only illogical and bad policy, it is inconsistent with RCW 82.32.170 which requires a taxpayer to set forth “**the reasons why**” the conference should be granted,

and “**the amount in which the tax . . .** should be refunded.” (Emphasis added).

The basic notice requirement established by RCW 82.32.170 is neither unreasonable nor unfair. In the present case, Tesoro Refining had every opportunity to uncover and seek a refund of its overpayments before the nonclaim period set out in RCW 82.32.060 had lapsed. The fact that it failed to do so is not justification for ignoring the legislatively mandated time limitations for claiming a refund of Washington excise taxes. Simply put, there is nothing unfair or unreasonable in denying a refund claim that was not identified until after the nonclaim statute had run.

In the final analysis, Tesoro Refining’s December 21, 2001 petition for administrative review of the audit assessment did not identify the specific overpayments at issue. As a result, that petition did not meet the requirements of RCW 82.32.170. Appellants’ claim to the contrary is inconsistent with the statute and with the holding in *Guy F. Atkinson*, and should be rejected.

4. Rule 229 and the Department’s internal tax refund processing instructions do not support Tesoro Refining’s arguments.

Tesoro Refining asserts that the “failed to take the export deductions” claim included in its December 21, 2001 petition for administrative review was “legally sufficient” because “RCW

82.32.060(1) . . . does not impose requirements on the contents of an application” for refund. Appellants’ Br. at 11. Tesoro Refining essentially ignores RCW 82.32.170, mentioning that statute only briefly in a footnote. Appellants’ Br. at 12 n.5. Thus, Tesoro Refining’s “legally sufficient” argument is based on a false initial premise -- that RCW 82.32.170 does not apply. For this reason alone, Tesoro Refining’s analysis is flawed and should be rejected.

Building on its flawed initial premise, Tesoro Refining goes on to assert that its “failed to take the export deductions” claim was adequate under WAC 458-20-229 and under the Department’s internal tax refund processing instructions relating to “protective refund claims.” Appellants’ Br. at 12-14. In effect, Tesoro Refining asserts that the administrative rule and the internal processing instructions allow a taxpayer to identify the grounds supporting its refund claim at any time, even after the refund claim has been processed and denied. While it is true that the Department will work with a taxpayer to try to cure a vague or otherwise defective refund claim, the time within which to cure the refund claim is when the Department is processing the claim, not after it has been denied. Tesoro Refining is simply reading more into the Department’s rule and internal processing instructions than is justified from the actual language of those documents.

a. Rule 229 does not support Tesoro Refining's arguments.

The Department explains the procedures relating to refund or credit of overpaid taxes in WAC 458-20-229 ("Rule 229"). Tesoro Refining asserts that the Rule "does not impose a specificity requirement." Appellants' Br. at 12. This argument is incorrect for two reasons. First and foremost, the so-called "specificity requirement" relating to an application for refund is set out in RCW 82.32.170. As noted above, that statute provides that a taxpayer "shall set forth the reasons why the conference should be granted, and the amount in which the tax, interest, or penalty, should be refunded." This is a statutory requirement. Rule 229 does not, and cannot, waive that requirement. *Mayflower Park Hotel v. Dep't of Revenue*, 123 Wn. App. 628, 633, 98 P.3d 534 (2004) (statute controls over any contrary administrative rule).

In addition, Tesoro Refining is simply incorrect when it asserts that Rule 229 contains no "specificity requirement." For example, before it was amended in 2008, Rule 229 (4)(d) provided that when a refund application is filed with the Department, "[t]he taxpayer should include a detailed description or explanation of the claimed overpayment." WAC 458-20-229(4)(d) (2007). In addition, former Rule 229(4)(f) provided that "[g]enerally, 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.” WAC 458-20-229(4)(f) (2007). The former Rule also explains that if a taxpayer is not able to provide the necessary information within the statutory time limit set out in RCW 82.32.060(1), the taxpayer can request a waiver under RCW 82.32.060(2). *See Id.* (“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 . . . if the taxpayer will execute a statute of limitations waiver.”).

Rule 229 does not support Tesoro Refining’s arguments in this case. While the Rule does not include the precise language set out in RCW 82.32.170, it does inform taxpayers that they have an obligation to identify and document a claim for refund. Thus, the Rule is consistent with the statute. Tesoro Refining simply ignores one of the controlling statutes (RCW 82.32.170) and misinterprets the Department’s Rule.

b. The Department’s internal tax refund processing instructions do not support Tesoro Refining’s arguments.

Tesoro Refining’s reliance on the Department’s internal tax refund processing instructions is also misplaced. *See Appellants’ Br.* at 14. First, the Department’s internal processing instructions do not confer a

substantive right on taxpayers. *Joyce v. Dep't of Corr.*, 155 Wn.2d 306, 323, 119 P.3d 825 (2005) (“Unlike administrative rules and other formally promulgated agency regulations, internal policies and directives generally do not create law.”); *Crystal v. United States*, 172 F.3d 1141, 1148 (9th Cir. 1999) (“Courts are uniform of the view that internal rules of agency procedure confer no substantive rights on taxpayers.”). Thus, Tesoro Refining cannot rely on the Department’s internal policies as creating a right to a refund if the refund claim was untimely or otherwise defective.

In addition, when read in context, the Department’s internal processing instructions are not inconsistent with the statutory requirements of RCW 82.32.060 and .170. Those internal instructions simply inform Department excise tax examiners that a taxpayer can submit a timely refund application that does not contain all the information need to review and process the application at that time. CP 188. The instructions go on to explain the process and procedures for requesting additional information and working with the taxpayer to promptly and efficiently process the refund application. CP 188-89.

This process was followed in the present case. Tesoro Refining’s December 21, 2001 administrative appeal petition and its December 13, 2001 “amended” application for refund, were both reviewed by the Department’s Audit Division. The audit review resulted in a post

assessment adjustment to the December 4, 2001 tax deficiency assessment. CP 357-409 (PAA # 1); CP 411-14 (Auditor's Detail of Differences explaining credits and adjustments made in PAA #1). Because of the number and complexity of the issues raised by Tesoro Refining, this review process took over eighteen months to complete. CP 357 (Post Audit Adjustment # 1 dated August 14, 2003). During the review process, the Audit Division worked with Tesoro Refining to verify and process all the claims contained in the administrative appeal petition and in the "amended" application for refund. While Tesoro Refining provided information and documents supporting several of its claims, it provided no additional explanation to support its claim that it "failed to take" all the export deductions, credits or exemptions it was entitled to. *See* CP 411-14 (discussing credits and adjustments allowed). As a result, Tesoro Refining's "failed to take the export deductions" claim was denied. CP 413 ("Other than credits given above, taxpayer hasn't provided documents showing where further adjustment is required.").

Approximately one month later, in September 2003, Tesoro Refining filed a petition for administrative review of PAA # 1 in which, for the first time, it identified the four specific grounds for refund at issue in this case. CP 416-18. By that time the nonclaim period set out in RCW 82.32.060 had lapsed and the Department had completed its review of

Tesoro Refining's timely filed applications for refund. While Tesoro Refining was allowed an offset against the tax deficiency assessment as required by *Paccar, Inc. v. Dep't of Revenue*, the Department correctly denied any additional refund. CP 510-11. Nothing in the Department's internal tax refund processing instructions supports Tesoro Refining's claim that it is entitled to any greater relief.

C. Tesoro Refining's "Failed To Take The Export Deductions" Refund Claim Could Not Be Amended Or Supplemented By New Grounds For Refund Identified After The Time Limit Set Out In RCW 82.32.060(1) Had Lapsed.

Nothing in either RCW 82.32.060 or RCW 82.32.170 suggests that a taxpayer can raise new refund claims, or "supplement" invalid or insufficient refund claims, after the nonclaim time limit in RCW 82.32.060 has lapsed. Recognizing this lack of direct statutory support, Tesoro Refining suggests that a "supplementation" provision should be engrafted onto the administrative refund provisions by analogy. Appellants' Br. at 18-19. Tesoro Refining goes on to suggest that the "relation back" doctrine and the federal "general claims" doctrine supply an "analogous body of law that supports the conclusion that the September 2003 [petition for administrative review of PAA # 1] properly supplemented the December 21, 2001 claim." *Id.* at 19. The Department

respectfully disagrees. Neither “doctrine” relied on by Tesoro Refining provides adequate support for its “supplementation” argument.

Tesoro Refining relies on *Miller v. Campbell*, 164 Wn.2d 529, 192 P.3d 352 (2008), for its assertion that the “relation back” doctrine should be applied in this case by analogy. Appellants’ Br. at 19. The “relation back” doctrine is a function of Civil Rule 15(c). That rule of civil procedure allows amended pleadings to relate back to the date of the original pleading if the amendment “arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading.” CR 15(c); *Miller*, 164 Wn.2d at 537. However, the administrative refund provisions set out in RCW 82.32.060 and .170 do not contain an “amendment” provision similar to CR 15(c). As a result, the analogy simply does not hold since CR 15(c) expressly permits an amended pleading to “relate back” to the original pleading in certain circumstances, while RCW 82.32.060 and .170 do not. Tesoro Refining ignores this important distinction.

Tesoro Refining’s reliance on the federal “general claims” doctrine is also without merit. That federal doctrine permits a general federal tax refund claim to be amended by a later specific refund claim submitted to the Internal Revenue Service after the federal tax refund statute of limitation has lapsed but before the Service has rejected the claim.

Computervision Corp. v. Untied States, 445 F.3d 1355, 1368 (Fed. Cir. 2006). The doctrine is a form of equitable tolling of the federal statute of limitations.

RCW 82.32.060 is a nonclaim statute, not a statute of limitations. *Guy F. Atkinson*, 66 Wn. 2d at 572. As a result, equitable doctrines like the “general claims” doctrine do not permit the statutory time limit to be tolled or otherwise extended beyond what the Legislature has allowed. *Cf. In re Estate of Wilson*, 8 Wn. App. 519, 525, 507 P.2d 902 (1973) (“Equitable considerations may not mitigate the strict requirements of the [nonclaim] statute where a timely claim has not been filed . . .”). Thus, there is no justification for engrafting the federal “general claims” doctrine onto the Washington refund nonclaim statute. To do so would conflict with the fundamental nature of a nonclaim statute.

In addition, as noted in Mertens Law of Federal Income Taxation, the general rule applied by federal courts in tax refund disputes is that “[a]mendments made after the expiration of the limitations period will not be permitted if they require examination of facts that would not have been discovered in an investigation under the claim as originally filed, or if they raise new grounds.” 15 Mertens Law of Federal Income Taxation § 58:37

(Supp. 2010).¹⁰ In the present case, there is no genuine dispute that the four new grounds for refund identified in Tesoro Refining's September 13, 2003 petition for administrative review of PAA # 1 required examination and investigation of facts that were not discovered in the investigation of Tesoro Refining's initial refund application. *See* CP 411-14 (Auditor's Detail of Differences addressing Tesoro Refining's December 2001 petition for administrative review and "amended" application for refund); CP 511 (administrative law judge remanded the petition for administrative review to the Audit Division in April 2007 for further investigation and computation of the offset allowed under *Paccar*); CP 514-29 (PAA # 3 computing offset allowed under *Paccar*). In other words, not only were these new claims raised after the Audit Division had completed its review of Tesoro Refining's various timely refund applications, each of the four new claims required examination of facts not identified or uncovered in that review process. Thus, the federal "general claims" doctrine would not apply in this case even if that doctrine was engrafted onto the Washington administrative refund statutes.

Tesoro Refining is mistaken when it asserts that the "relation back" doctrine and federal "general claims" doctrine support the conclusion that its September 2003 administrative appeal petition properly supplemented

¹⁰ Copy attached as Appendix C.

its vague “failed to take the export deductions” claim. Neither doctrine is applicable here, either directly or by analogy. As a result, Tesoro Refining’s efforts to engraft a “supplementation” provision onto the administrative refund statutes should be rejected. *See State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003) (courts should not add words to an unambiguous statute).

D. The Second Sentence Of RCW 82.32.060(1), When Read In Context With The Statute As A Whole, Does Not Support Tesoro Refining’s Alternative Argument.

Tesoro Refining argues, in the alternative, that it should be awarded a refund of overpayments made during 1997 and 1998 because it applied for a refund of those overpayments within four years from the date the Department completed its audit examination of Tesoro Refining’s excise tax returns covering those periods. Appellants’ Br. at 21-22.

Tesoro Refining supports this alternative argument by quoting a portion of one sentence in RCW 82.32.060. Appellants’ Br. at 21. However, when the statute is construed as a whole, there is no merit to Tesoro Refining’s alternative argument.

RCW 82.32.060(1) provides:

(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**.

(Emphasis added). As discussed in *Guy F. Atkinson*, RCW 82.32.060 establishes two situations in which the Department is allowed to refund overpaid taxes. The first is when a taxpayer makes an application for a refund or for an audit of its records. *Guy F. Atkinson*, 66 Wn. 2d at 573-74. The second is when the Department uncovers an overpayment during an examination of the taxpayer's returns or records. *Id.* at 574. In the first instance, a refund is allowed only for taxes, penalties, or interest paid within four years prior to the beginning of the calendar year in which the refund application is made. In the second instance, a refund is allowed only for taxes, penalties, or interest paid within four years prior to the beginning of the calendar year in which the examination of records is completed.

In the present case, the Department did not uncover the hazardous substance tax overpayments at issue during its audit of Tesoro Refining's 1996 through 1998 tax filings. Thus, the time limit relating to an

overpayment uncovered by the Department in the course of an audit examination does not apply. Tesoro Refining simply reads the statute out of context when it contends that the phrase “or examination of records is completed” applies in this case.

The plain meaning of RCW 82.32.060 should be “discerned from all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision” *Dep’t of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 11, 43 P.3d 4 (2002). Construing a portion of one sentence out of context, as Tesoro Refining does here, is improper. *Id.* When construed as a whole, it is clear that the phrase “or examination of records is completed” relates to an overpayment uncovered by the Department in an audit examination. Tesoro Refining’s argument to the contrary is inconsistent with the statute when read as a whole and inconsistent with the Supreme Court’s interpretation in *Guy F. Atkinson*.

Tesoro Refining’s proposed “alternative” interpretation of the nonclaim statute is also inconsistent with the holding in *Paccar, Inc. v. Dep’t of Revenue*, 135 Wn.2d 301, 957 P.2d 669 (1998). In *Paccar*, the taxpayer was audited and received a tax deficiency assessment covering the 1977 through 1981 tax periods. *Id.* at 304. The assessment was issued in December 1982 after the conclusion of the audit. *Id.* Paccar paid the

assessment in early 1983. *Id.* Two years later, in 1985, Paccar filed a refund suit in superior court seeking a refund of business and occupation (B&O) taxes that it had overpaid during the same 1977 through 1981 period covered in the audit assessment. Unfortunately the nonclaim time limit set out in RCW 82.32.060 had lapsed for the 1977 through 1980 tax periods before Paccar filed its refund suit. Paccar argued, however, that it was still entitled to offset the overpaid taxes against the tax assessment because (1) the tax assessment was in excess of the amount “properly due,” and (2) Paccar had paid that tax assessment less than four years prior to initiating its refund suit in superior court. *Id.* at 312.

On appeal, the Washington Supreme Court agreed with Paccar:

The 1979 version of RCW 82.32.060, in effect when Petitioner filed its refund petition in 1985, states that if a tax has been paid in excess of that properly due, the excess amount shall be refunded if a refund petition is filed within four years of the year in which the tax is paid. The language of the statute is unambiguous. Therefore under its plain and ordinary meaning, Petitioner is entitled to a refund of taxes paid in excess of those properly due if Petitioner files a refund petition within four years of the payment.

As the trial court determined, because Petitioner PACCAR overpaid its taxes in the years 1977 to 1981, it should have received a refund instead of an assessment of additional taxes. Consequently, the entire amount PACCAR paid as a result of the deficiency assessment, \$176,205.00, was paid “in excess of the amount properly due.” The applicable versions of RCW 82.32.060 provide that petitions for refunds are timely if filed within four years of the year in which the tax was paid. PACCAR filed its petition in 1985,

within four years of its 1983 payment of the deficiency assessment. Its petition was timely filed.

Id. at 320. Thus, while Paccar was not entitled to a refund of the full amount of the B&O tax it overpaid in 1977 through 1980, it was entitled to a refund of the tax deficiency assessment it paid in 1983 because that assessment was in excess of the “amount properly due.”

The Court in *Paccar* did not hold that the audit examination that was completed in 1982 provided Paccar with an additional four year period within which to apply for a refund. Rather, the Court held that under the plain and ordinary language of the statute, “RCW 82.32.060 provide[s] that petitions for refunds are timely if filed within four years of the year in which the tax was paid.” *Id.* It was the payment of the assessed tax in 1983, not the fact that the audit examination was completed in 1982, which allowed Paccar to obtain a refund. Moreover, the refund was limited to the amount of tax paid in 1983. No refund was allowed for the additional B&O tax Paccar overpaid in 1977 through 1980.

In the present case, Tesoro Refining received the proper amount of refund or credit it is entitled to under the holding in *Paccar*. CP 539 (post assessment adjustment reducing audit assessment to zero). It is entitled to no additional relief. Tesoro Refining’s “alternative” argument to the

contrary is simply inconsistent with the statute and with the holdings in *Guy F. Atkinson* and *Paccar*, and should be flatly rejected.

V. CONCLUSION

For the reasons set forth above, the Department respectfully requests that the Court affirm the superior court's order granting the Department of Revenue's motion for summary judgment and denying Tesoro Refining's cross-motion. The superior court correctly rejected Appellants' claim for refund of amounts over and above the offset allowed under *Paccar*.

RESPECTFULLY SUBMITTED this 1st day of March, 2010.

ROBERT M. MCKENNA
Attorney General



CHARLES ZALESKY, WSBA No. 37777
Assistant Attorney General
Attorneys for Respondent

West's
REVISED CODE OF
WASHINGTON
ANNOTATED

Title 82
EXCISE TAXES
Chapters 82.14 to 82.37

*Under Arrangement of the Official
Revised Code of Washington*

THOMSON
—★—
WEST

Mat #40599599

© 2008 Thomson Reuters/West

This publication was created to provide you with accurate and authoritative information concerning the subject matter covered; however, this publication was not necessarily prepared by persons licensed to practice law in a particular jurisdiction. The publisher is not engaged in rendering legal or other professional advice, and this publication is not a substitute for the advice of an attorney. If you require legal or other expert advice, you should seek the services of a competent attorney or other professional.

West's and Westlaw are registered in the U.S. Patent and Trademark Office.

and buyer has notice of assessment and his responsibility for paying it, amount then constitutes debt from buyer to seller. *Morrison-Knudsen Co. v. State*, Dept. of Revenue (1972) 6 Wash.App. 306, 493 P.2d 802.

State can constitutionally be charged audit interest on delinquent retail sales taxes under authority of this section when making taxable purchases. *Morrison-Knudsen Co. v. State*, Dept. of Revenue (1972) 6 Wash.App. 306, 493 P.2d 802.

4. Collection of taxes

Seizure by department of revenue of taxpayer's bank account as payment for delinquent taxes did not violate taxpayer's due process rights where department followed statutory procedures under § 82.32.010 et seq., gave taxpayer notice of tax assessed against him, and afforded taxpayer administrative hearing on matter of his tax liability. *Peters v. Sjöholm* (1981) 95 Wash.2d 871, 631 P.2d 937, appeal dismissed, certiorari denied 102 S.Ct. 1267, 455 U.S. 914, 71 L.Ed.2d 455. Constitutional Law ⇐ 4135

For seizure of bank account to be valid, seizing agency must have probable cause to believe bank fund belongs to taxpayer, but it does not need ordi-

nary search and seizure warrant. *Peters v. Sjöholm* (1981) 95 Wash.2d 871, 631 P.2d 937, appeal dismissed, certiorari denied 102 S.Ct. 1267, 455 U.S. 914, 71 L.Ed.2d 455. Taxation ⇐ 3705

Under this section, the Department of Revenue may hold collection of taxes in abeyance past the 4-year period in which the final assessment must be made. *Conversions and Surveys, Inc. v. State By and Through Dept. of Revenue* (1974) 11 Wash.App. 127, 521 P.2d 1203, review denied.

5. Hearing

In area of tax collection, it is constitutionally sound to postpone opportunity for hearing until after payment of delinquent taxes. *Peters v. Sjöholm* (1981) 95 Wash.2d 871, 631 P.2d 937, appeal dismissed, certiorari denied 102 S.Ct. 1267, 455 U.S. 914, 71 L.Ed.2d 455. Taxation ⇐ 2111

6. Jury trial

There is no right to trial by jury prior to imposition and enforcement of any tax liability. *Peters v. Sjöholm* (1981) 95 Wash.2d 871, 631 P.2d 937, appeal dismissed, certiorari denied 102 S.Ct. 1267, 455 U.S. 914, 71 L.Ed.2d 455. Jury ⇐ 19(17)

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

82.32.060**EXCISE TAXES**

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 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.

(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

ADMINISTRATIVE PROVISIONS

82.32.060

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, eff. July 1, 2004; 2003 c 73 § 2, eff. Jan. 1, 2004; 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.]

Historical and Statutory Notes

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.]

West's
REVISED CODE OF
WASHINGTON
ANNOTATED

Title 82
EXCISE TAXES
Chapters 82.14 to 82.37

*Under Arrangement of the Official
Revised Code of Washington*

THOMSON
—*—
WEST

Mat #40599599

© 2008 Thomson Reuters/West

This publication was created to provide you with accurate and authoritative information concerning the subject matter covered; however, this publication was not necessarily prepared by persons licensed to practice law in a particular jurisdiction. The publisher is not engaged in rendering legal or other professional advice, and this publication is not a substitute for the advice of an attorney. If you require legal or other expert advice, you should seek the services of a competent attorney or other professional.

West's and Westlaw are registered in the U.S. Patent and Trademark Office.

82.32.160

Note 1

(repealed; see, now, §§ 82.32.160 to 82.32.180) prior to its 1951 amendment, were reasonable, fair, and adequate, and subject to no condition except time limitation prescribed. *American Steel & Wire Co. of N. J. v. State* (1956) 49 Wash.2d 419, 302 P.2d 207. Licenses ⇨ 7(1)

2. In general

There is nothing in statutes which requires that notice be given for overpayments of taxes such as is provided for in this section in those instances where assessment indicates tax has not already been paid; in such cases of tax overpayment taxpayer must proceed under §§ 82.32.170 and 82.32.180 to pursue his remedy. *Guy F. Atkinson Co. v. State* (1965) 66 Wash.2d 570, 403 P.2d 880.

EXCISE TAXES

Establishment of exclusive remedy against state for recovery of taxes illegally collected is not invasion of constitutional rights, if remedy afforded is fair and adequate and does not deprive taxpayer of procedural due process. *American Steel & Wire Co. of N. J. v. State* (1956) 49 Wash.2d 419, 302 P.2d 207. Taxation ⇨ 2110

3. Limitation of actions

State may limit time in which to bring action for refund of tax illegally collected, provided method and procedure established do not violate constitutional right of taxpayer. *American Steel & Wire Co. of N. J. v. State* (1956) 49 Wash.2d 419, 302 P.2d 207. Taxation ⇨ 2786

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, eff. July 22, 2007; 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.]

Historical and Statutory Notes

Part headings not law—2007 c 111: Laws 2007, ch. 111, § 111 inserted
See note following RCW 82.16.120. provisions relating to electronic notice.
Effective date—1967 ex.s. c 26: See
note following RCW 82.01.050.

Mertens Law of Federal Income Taxation
Database updated February 2010
Chapter 58. CLAIMS FOR REFUND

Revised by
 Larry C. Fedro, Adjunct Professor
 William H. Byrnes, IV, AJD, LL.M., Assistant Dean
 Christopher M. Sove, JD[FN*]
I. Claims for Refund in General
D. Amendments, Successive and Rejected Claims

§ 58:37. Amendment of claim after time for filing has expired

West's Key Number Digest

West's Key Number Digest, Internal Revenue ☞4966

West's Key Number Digest, Internal Revenue ☞5006

Certain amendments may be allowed even though the limitations period has expired. An amendment is permissible if it merely makes more definite matters already within the Commissioner's knowledge, or identifies facts that in the course of investigation would naturally have been ascertained.[FN1] An amendment should be allowed if it merely modifies the facts, or adds grounds based on facts stated in the claim as originally filed. Such amendments have been allowed to increase the amount of the refund demanded based on the same facts and grounds stated in the original claim,[FN2] to supplement the facts stated in the original claim,[FN3] or to change the theory of the claim to bring it into accord with an intervening Supreme Court decision.[FN4]

A late amendment also may be allowed if the Service has not yet taken final action, provided the original claim was specific and no new grounds are raised; this is treated as being merely a correction of a technical defect in the original claim.[FN5] An amendment may also be available if the Service has waived the requirement that the claim for refund be specific.[FN6] Amendments made after the expiration of the limitations period will not be permitted if they require examination of facts that would not have been discovered in an investigation under the claim as originally filed,[FN7] or if they raise new grounds.[FN8] An amendment based on facts not disclosed in the original claim or on new grounds is in reality a new claim which would be barred by the statute of limitations.[FN9]

A claim that has been rejected is considered no longer in existence, and cannot be amended after the expiration of the statute of limitations.[FN10] As to claims that have been accepted by the Service, the Eleventh Circuit has said that the amendment is allowable (the limitations period had not expired) where it asserted the same grounds for relief as the original claim.[FN11]

Although amendments to a properly filed claim can be made even though the statutory period for filing a claim has expired, the amendment must be germane, and must be presented before the original claim is resolved.[FN12]

[FN*] Thomas Jefferson School of Law

International Tax and Financial Services Graduate Program

[FN1] U.S. v. Andrews, 1938-1 C.B. 322, 302 U.S. 517, 524, 58 S. Ct. 315, 319, 82 L. Ed. 398, 403, 38-1 U.S. Tax Cas. (CCH) P 9020, 19 A.F.T.R. (P-H) P 1243 (1938).

[FN2] F.W. Woolworth Co. v. U.S., 91 F.2d 973, 37-2 U.S. Tax Cas. (CCH) P 9416, 20 A.F.T.R. (P-H) P 205 (C.C.A. 2d Cir. 1937); Austin Nat. Bank v. Scofield, 84 F. Supp. 483, 48-2 U.S. Tax Cas. (CCH) P 10635, 37 A.F.T.R. (P-H) P 1604 (W.D. Tex. 1948); First Nat. Bank & Trust Co. of Chickasha v. U. S., 329 F. Supp. 1147, 71-2 U.S. Tax Cas. (CCH) P 9556, 28 A.F.T.R.2d 71-5270 (W.D. Okla. 1971), judgment aff'd, 462 F.2d 908, 72-2 U.S. Tax Cas. (CCH) P 9591, 30 A.F.T.R.2d 72-5268 (10th Cir. 1972).

[FN3] Jones v. First Nat. Bldg. Corp., 155 F.2d 815, 46-1 U.S. Tax Cas. (CCH) P 9270, 34 A.F.T.R. (P-H) P 1418 (C.C.A. 10th Cir. 1946).

[FN4] H.B. Zachry Co. v. U.S., 144 Ct. Cl. 124, 168 F. Supp. 777, 59-1 U.S. Tax Cas. (CCH) P 9107, 2 A.F.T.R.2d 6284 (1958).

[FN5] Bemis Bros. Bag Co. v. U.S., 1933-1 C.B. 338, 289 U.S. 28, 53 S. Ct. 454, 77 L. Ed. 1011, 3 U.S. Tax Cas. (CCH) P 1063, 12 A.F.T.R. (P-H) P 28 (1933).

[FN6] **U.S. v. Memphis Cotton Oil Co., 1933-1 C.B. 307, 288 U.S. 62, 53 S. Ct. 278, 77 L. Ed. 619, 3 U.S. Tax Cas. (CCH) P 1025, 11 A.F.T.R. (P-H) P 1116 (1933); U.S. v. Baltimore & O.R. Co., 124 F.2d 344, 42-1 U.S. Tax Cas. (CCH) P 9153, 28 A.F.T.R. (P-H) P 661 (C.C.A. 4th Cir. 1941).**

[FN7] U.S. v. Garbutt Oil Co., 1938-1 C.B. 370, 302 U.S. 528, 58 S. Ct. 320, 82 L. Ed. 405, 38-1 U.S. Tax Cas. (CCH) P 9021, 19 A.F.T.R. (P-H) P 1248 (1938).

[FN8] Union Pacific R. Co. v. U.S., 182 Ct. Cl. 103, 389 F.2d 437, 68-1 U.S. Tax Cas. (CCH) P 9173, 21 A.F.T.R.2d 478 (1968); McCabe's Estate v. U. S., 201 Ct. Cl. 243, 475 F.2d 1142, 73-1 U.S. Tax Cas. (CCH) P 12912, 31 A.F.T.R.2d 73-1403 (1973); Favell v. U.S., 22 Ct. Cl. 571, 91-1 U.S. Tax Cas. (CCH) P 50095, 67 A.F.T.R.2d 91-581, 1991 WL 23005 (1991).

[FN9] U.S. v. Andrews, 1938-1 C.B. 322, 302 U.S. 517, 58 S. Ct. 315, 82 L. Ed. 398, 38-1 U.S. Tax Cas. (CCH) P 9020, 19 A.F.T.R. (P-H) P 1243 (1938); Burwell Motor Co. v. C. I. R., 29 T.C. 224, 1957 WL 971 (T.C. 1957).

[FN10] Tobin v. Tomlinson, 310 F.2d 648, 62-2 U.S. Tax Cas. (CCH) P 9827, 10 A.F.T.R.2d 6011 (5th Cir. 1962), citing Mertens text; **U.S. v. Memphis Cotton Oil Co., 1933-1 C.B. 307, 288 U.S. 62, 53 S. Ct. 278, 77 L. Ed. 619, 3 U.S. Tax Cas. (CCH) P 1025, 11 A.F.T.R. (P-H) P 1116 (1933); Newport Industries v. U.S., 104 Ct. Cl. 38, 60 F. Supp. 229, 45-1 U.S. Tax Cas. (CCH) P 9285, 33 A.F.T.R. (P-H) P 1324 (1945); Young v. U.S., 203 F.2d 686, 53-1 U.S. Tax Cas. (CCH) P 9359, 43 A.F.T.R. (P-H) P 744 (8th Cir. 1953). In Watson v. U.S., 246 F. Supp. 755, 65-2 U.S. Tax Cas. (CCH) P 9641, 16 A.F.T.R.2d 5695 (E.D. Tenn. 1965) (citing Tobin v. Tomlinson), the Court treated taxpayer's letters as an informal claim which was filed during the statutory period.**

[FN11] Mutual Assur., Inc. v. U.S., 56 F.3d 1353, 95-2 U.S. Tax Cas. (CCH) P 50361, 76 A.F.T.R.2d 95-5132 (11th Cir. 1995), nonacquiescence recommended by, AOD-1999-14, 1999 WL 33104615 (I.R.S. AOD 1999) and nonacq., 1999-2 C.B.xvi.

MERTENS § 58:37
15 Mertens Law of Fed. Income Tax'n § 58:37

Page 3

[FN12] Mobil Corp. v. U.S., 52 Fed. Cl. 327, 2002-1 U.S. Tax Cas. (CCH) P 50432, 89 A.F.T.R.2d 2002-2105 (2002). See also U.S. v. Andrews, 1938-1 C.B. 322, 302 U.S. 517, 58 S. Ct. 315, 82 L. Ed. 398, 38-1 U.S. Tax Cas. (CCH) P 9020, 19 A.F.T.R. (P-H) P 1243 (1938).

Westlaw. © 2010 Thomson Reuters

MERTENS § 58:37
END OF DOCUMENT

© 2010 Thomson Reuters. No Claim to Orig. US Gov. Works.

FILED
COURT OF APPEALS
DIVISION III

10 MAR -2 PM 12:44

NO. 40008-1-II

STATE OF WASHINGTON

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

DEPUTY

SHELL OIL COMPANY AND
TESORO REFINING & MARKETING
COMPANY,

Appellant,

v.

STATE OF WASHINGTON
DEPARTMENT OF REVENUE,

Respondent.

CERTIFICATE OF
SERVICE

I certify that I served a true and correct copy of the Brief of
Respondent, via Electronic mail and U.S. Mail, postage prepaid, through
Consolidated Mail Services, on the following:

Gregg D. Barton
GBarton@perkinscoie.com
Stephanie J. Boehl
SBoehl@perkinscoie.com
PERKINS COIE LLP
1201 Third Avenue, Suite 4800
Seattle, WA 98101-3099

Peter A. Lowy
Peter.A.Lowy@shell.com
SHELL OIL COMPANY
910 Louisiana St., Suite 4318
Houston, TX 77002

1 ORIGINAL

I certify under penalty of perjury under the laws of the State of
Washington that the foregoing is true and correct.

DATED this 1st day of March, 2010, at Tumwater, WA.


KRISTIN D. JENSEN, Legal Assistant