Excise Tax Advisory

Excise Tax Advisories are interpretive statements authorized by RCW 34.05.230.

ETA 3055.2019 Issue Date: June 5, 2019

BTA Non-acquiescence

Background

The Board of Tax Appeals (the BTA), a separate agency from the Department of Revenue, decides both formal and informal administrative appeals from determinations made and actions taken by the Department. BTA decisions bind the Department only for the individual taxpayer's case and for the time period under appeal. BTA decisions in informal cases, by law, cannot be appealed by the Department.

All BTA decisions are available to the public. The Department does not always agree with adverse BTA decisions. In some cases, the Department needs to inform the public, tax practitioners, and the Department's employees that it disagrees with an adverse BTA decision. The Department has decided to issue these statements via this excise tax advisory (ETA) or revision to this ETA to avoid misunderstandings about how the Department will apply these BTA decisions to other taxpayers' situations.

Any statement issued about a BTA decision may be withdrawn or modified at any time. The lack of a statement issued by the Department about any BTA decision has no meaning. It neither implies agreement or disagreement with a BTA decision.

The Department issued its non-acquiescence to the following decision on June 5, 2019

Choice Regional Health Network

The Department does not acquiesce in the Board of Tax Appeals' decision in *Choice Regional Health Network v. Dep't of Revenue*, BTA Informal Docket No. 86186 (2018).

Choice Regional Health Network involved an appeal of the Department's disallowance of deduction of membership dues income under RCW 82.04.4282. The taxpayer, a nonprofit organization of health care providers, provides a forum for members to collaborate to improve efficient use of resources and health care quality. Regional hospitals are dues-paying members and comprise a majority of the Board of Directors. The taxpayer implemented a two-year patient referral program to reduce costly misuse of hospital emergency departments and refer patients for more appropriate care, resulting in a $1.9 million reduction in emergency department charges.

In overruling the Department, the BTA misinterpreted case law[1] and Department determinations[2] to create two new requirements for a good or service to qualify as significant and provided in exchange for dues under RCW 82.04.4282. First, the BTA incorrectly concluded that a good or service was not provided in exchange for dues unless there was a direct relationship between dues paid and the member's expectation of goods and services in return. The BTA concluded the Department had not shown this direct relationship because the program was directed at patients not Board members, hospital members did not have an enforceable right to the referral program, and cost savings were incidental because the Department had not shown the $1.9 million reduction in charges translated directly to significant cost savings.

Second, the BTA incorrectly inferred from Department determinations and case law a requirement that for a good or service to be significant, it must have a measurable "calculable" value in the market place. The BTA misinterpreted the Department's holding in Det. No. 12-0023, 36 WTD 139 (2017), that a quality assurance program provided to physician members was a measurable benefit as illustrated by a comparable program in the market place. The BTA erred in holding that without evidence of the program's calculable value in the market place, it is not a significant service provided in exchange for dues.

The Department issued its non-acquiescence to the following decision on August 21, 2017

Sustainable NE Seattle

The Department of Revenue does not acquiesce to *Sustainable NE Seattle v. Department of Revenue*, BTA Informal Docket Nos. 87679 to 87686 (Mar. 23, 2017).

The BTA ruled that a tool library loaning construction tools and other implements to members, free of charge, qualified for a "benevolent social service" property tax exemption. RCW 84.36.030(1)(a); WAC 458-16-210. To qualify for the exemption

[1] *Red Cedar Shingle v. State of Washington*, 62 Wn.2d 341, 382 P.2d 503 (1963); *Group Health Coop. of Puget Sound, Inc. v. Washington State Tax Comm'n*, 72 Wn.2d 422, 433 P.2d 201 (1967); and *Automobile Club of Washington v. Dep't of Revenue*, 27 Wn. App. 781, 621 P.2d 760 (1980).
[2] Det. No. 12-0023, 36 WTD 139 (2017) (citing Det. No. 86-310, 2 WTD 91 (1986) ("amounts which are paid to an organization in return for measurable, compensable goods and services for which persons expect to pay a charge in the marketplace are excluded from the deduction")).

the organization must, among other things, "relieve some public obligation." *Adult Student Housing, Inc. v. Department of Revenue*, 41 Wn.App. 583, 593-94, 705 P.2d 793, 798-99 (1985)) (a student housing provider seeking property tax exemption could not claim that it relieved county taxpayers of burden, since county had no statutory obligation to provide such housing). In *Sustainable NE Seattle*, the BTA broadly interpreted the relief requirement and found that the tool library relieved a public obligation by promoting home and community maintenance, thus lessening a government burden to confront consequences of dilapidated neighborhoods, and by enabling financial assistance recipients to allocate more income to nutrition, education, healthcare, and other expenses.

The Department does not believe the *Sustainable NE Seattle* decision is supported by pertinent law. The decision does not comport with the principle of statutory interpretation that property tax exemptions be narrowly construed. *See Belas v. Kiga*, 135 Wn.2d 913 (1998) (exemptions are subsidies to encourage publicly desired objectives; a key principle is that all property is taxable unless specifically exempt, and exemptions are to be narrowly construed); *see also, e.g., Adult Student Housing, Inc.*, 41 Wn.App. at 592-93, 705 P.2d at 798 (applying narrow meaning to "benevolent" requirement). In addition, neither Washington state agencies nor local governments are legally obligated to provide tools to citizens to promote home and community maintenance or to relieve poverty.

The Department issued its non-acquiescence to the following decision on August 22, 2016

Cascade Concrete

The Department of Revenue does not acquiesce in the Board of Tax Appeals' decision in *Cascade Concrete Industries Inc. v. Dep't of Revenue*, BTA Informal Docket No. 85855 (issued 7/01/15, Reconsideration denied 9/30/15).

Cascade Concrete involved the appeal of a post assessment adjustment made during the taxpayer's administrative appeal of an audit assessment. The adjustment was a result of the taxpayer providing additional records where the Department, among other things, discovered that the taxpayer was not entitled to a credit for the year 2006 that it was given in error during the audit, but the net effect was an overall reduction of the assessment. The BTA held that RCW 83.32.050(4) and WAC 458-20-230(7)(a) precluded the Department from netting the amounts because the RCW 82.32.050(4) four-year limitation for the *individual tax year* of 2006 – that was within the audit period – had run by the date the adjustment was issued. In doing so, the BTA did not follow *PACCAR Inc. v. Dep't of Revenue*, 135 Wn.2d 301, 321, 957 P.2d 669 (1998), providing that under the RCW 82.32.060 four-year refund claim limitation (which mirrors the RCW 82.32.050(4) four-year limitation) a taxpayer may receive a refund of excess taxes paid on a deficiency assessment for a period prior to the statutory four-year refund period if the taxpayer files a refund petition within four years of paying the deficiency assessment. Moreover, RCW 82.32.160 provides that assessments are not final,

due, and payable, until the conclusion of the Department's administrative appeals process. *See AOL v. Dep't of Revenue*, 149 Wn. App. 533, 553-554, 205 P.3d 159 (2009); *Murphey v. Glass*, 164 Wn. App. 584, 593, 267 P.3d 376, *rev. denied*, 173 Wn.2d 1022 (2012). Thus, netting of tax amounts due against allowable credits for periods covered by an assessment is allowable, and is not beyond the RCW 82.32.050(4) statutory limitation, if the assessment is pending administrative review before the Department and, therefore, per RCW 82.32.160, is not yet final. *Id.*

The Department issued its non-acquiescence to the following decision on May 25, 2005

Columbia Ready-Mix

The Department of Revenue does not acquiesce in the Board of Tax Appeals' decision in *Columbia Ready-Mix*, Docket No. 58759 (issued 6/22/04). *Columbia Ready-Mix* involved the production of asphalt using diesel fuel to supply heat. When diesel fuel is burned a small amount of ash is created and Columbia Ready-Mix disposed of this ash by allowing it to remain in the asphalt mixture or by adding it to blend sand, which was used in future asphalt batches. The Board held because the ash was included in the final product, it was an ingredient of asphalt and therefore purchases of diesel fuel were exempt from retail sales tax.

The Department of Revenue will not follow the Board's holding that purchases of diesel fuel, which is used to supply heat, is an ingredient in asphalt. We reach this conclusion because:

1. Diesel fuel ash is not a necessary ingredient of asphalt.

2. Diesel fuel ash was not found by the BTA to affect the strength, setting time, or any other characteristic of asphalt.

3. Asphalt can be made without diesel fuel ash.

The Department issued its non-acquiescence to the following decisions on October 18, 2004

1. Tillamook Cheese

The Department of Revenue does not acquiesce in the Board of Tax Appeals' decision in *Tillamook County Creamery Association, d/b/a Tillamook Cheese v. Dept. of Revenue*, Docket No. 58652, October 23, 2003; Order Denying Petition for Reconsideration, December 3, 2003. The Department will not

follow the Board's holding that Tillamook Cheese was eligible for the direct seller's representative exemption provided in RCW 82.04.423.

2. Modern Staple

The Department of Revenue does not acquiesce in the Board of Tax Appeals' decision in *Modern Staple, Inc. v. Dept. of Revenue*, Docket No. 58436, January 22, 2004; Amended Final Decision, March 22, 2004. *Modern Staple* involved a seller of

staples, nails, and other fasteners, and air tools for applying the fasteners. Modern Staple sometimes withdrew tools from inventory and provided them free of charge to larger customers who promised to purchase a sufficient volume of fasteners exclusively from Modern Staple. The Department will not follow the Board's holding that the tools were provided under a lease rather than a bailment.

The Department issued its non-acquiescence to the following decisions on October 31, 2003

1. Olympic Tug and Barge, Inc.

The Department of Revenue does not acquiesce in the Board of Tax Appeals' decision in *Olympic Tug and Barge, Inc*. 55558. (Issued 4/11/01.) *Olympic Tug and Barge* involved a taxpayer delivering bunker fuel to ocean-going vessels that moved directly to ports in other states or foreign countries. Olympic did not own or sell the fuel. It transported the fuel offshore to ships by tug or barge. Most of the bunker fuel was consumed outside the State of Washington on the high seas. Olympic's customers may have occasionally resold some of the bunker fuel outside the state.

The Department will not follow the Board's holding that for purposes of the public utility tax on fuel bunkering services under RCW 82.16.050(8), a taxpayer is transporting commodities when the fuel in question is consumed on the high seas and is never resold.

2. TMS Mortgage Inc./The Money Store, Inc.

The Department of Revenue does not acquiesce in the Board of Tax Appeals' decision in *TMS Mortgage Inc./The Money Store, Inc*. 54718. (Issued 6/26/01.) T*he Money Store* involved a taxpayer that created "REMICs"; a process regulated by Federal tax statutes in which the taxpayer pooled home mortgages into a trust. After selling most of the interest in the trusts, *The Money Store* realized a gain on sale that it recorded as income for its records. This gain was equal to the value of the interest Taxpayer retained in the REMICs. The Department will not follow the Board's holding that a taxpayer is entitled to treat such income as non-taxable home mortgage interest income under RCW 82.04.4292.

3. Tessenderlo Kerley, Inc.

The Department of Revenue does not acquiesce in the Board of Tax Appeals' decision in *Tessenderlo Kerley, Inc. v. Department of Revenue*, Docket No. 55090. (Issued September 18, 2000.) *Tessenderlo Kerley, Inc*. involved a taxpayer that possessed ammonium thiosulfate, a chemical that was listed on the federal CERCLA hazardous substance list when that list was incorporated into state law under RCW Chapter 82.21. The federal government subsequently delisted ammonium thiosulfate, but the state took no action to remove ammonium thiosulfate for state Hazardous Substance Tax (HST) purposes. Constitutionally, the Department cannot follow the Board's holding that ammonium thiosulfate was not subject to the HST,

absent action by the state to remove the substance for Washington HST purposes. Ammonium thiosulfate is no longer subject to the HST due to legislative amendments effective July 1, 2002.

4. Sound Refining

The Department of Revenue does not acquiesce in the Board of Tax Appeals' decision in *Sound Refining v. Department of Revenue*, Docket No. 54723 (Issued 3/31/00). *Sound Refining* involved a fuel oil seller who prepared a Hazardous Substance Tax fuel-in-tanks credit certificate on behalf of a Canadian customer who was not entitled to issue such a certificate under WAC 458-20-252. The Department will not follow the Board's holding that a taxpayer is entitled to prepare such a certificate for its customer without having to demonstrate that the certificate is received from the customer in good faith.

The Department issued its non-acquiescence to the following decisions on August 20, 2002

1. Lincoln Ballinger

The Department of Revenue does not acquiesce in the Board of Tax Appeals' decision in *Lincoln Ballinger Limited Partnership v. Department of Revenue*, Docket No. 51253 (October 7, 1998). *Lincoln Ballinger* involved the sale of an apartment complex. The Department will not follow the Board's holding that "the in-unit ranges, refrigerators, washers, and dryers should be considered as real property for purposes of the application of the sales tax in this case."

2. Cimlinc

The Department of Revenue does not acquiesce in the Board of Tax Appeals' decision in *Cimlinc, Inc. v. Department of Revenue*, Docket No. 54862 (June 13, 2000). *Cimlinc, Inc*. involved a taxpayer performing research and development services under contract. The Department will not follow the Board's holding that a taxpayer may claim the business and occupation tax credit for qualifying research and development performed by its sub-contractor, without an assignment of the credit from the sub-contractor to the taxpayer.

3. Puget Sound Industries

The Department of Revenue does not acquiesce in the Board of Tax Appeals' decision in *Puget Sound Industries, Inc. v. Department of Revenue*, Docket No. 54675 (August 16, 2000). *Puget Sound Industries* involved a taxpayer who transmits live programming under contract to a radio station. The Department will not follow the Board's holding that a taxpayer transmitting live programming under contract to a radio station, is also considered a broadcaster for business and occupation tax purposes when the frequency transmitted on is available to only a few listeners with specialized receivers.

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