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

In the Matter of the Petition for Correction of)	<u>D E T E R M I N A T I O N</u>
Assessment of)	
)	No. 20-0120
)	
...)	Registration No. . . .
)	

RCW 82.04.4498. ; WAC 458-20-105: VETERAN’S EMPLOYER TAX CREDIT (“VETC”) – EMPLOYEE QUALIFICATION: A governor of an LLC is an owner and not an employee and thus does not qualify for the VETC.

Headnotes are provided as a convenience for the reader and are not in any way a part of the decision or in any way to be used in construing or interpreting this Determination.

Lewis, T.R.O. – Taxpayer disputes the Department of Revenue’s denial of a veteran’s employer tax credit (“VETC”) against business & occupation (“B&O”) tax. We deny the taxpayer’s petition.¹

ISSUE:

Is a governor of a limited liability company a qualified employee for the purposes of the VETC under RCW 82.04.4498 and WAC 458-20-105 (“Rule 105”)?

FINDINGS OF FACT:

Taxpayer operates dog training schools in Washington, [and two other states], as well as online, as a limited liability company (“LLC”). Taxpayer opened a school in [Washington State] . . . and registered with the Department

Taxpayer first applied for the VETC on April 12, 2019, when it filed amended tax returns for its Q1/17 through Q4/18 tax returns and its Q1/19 tax return. On July 24, 2019, Taxpayer took the VETC when it filed the Q2/19 tax return. On July 31, 2019, the Department’s Taxpayer Account Administration (“TAA”) Division denied the credit requests based on the fact that [Taxpayer] claimed [its governing member] as the hired veteran and [Taxpayer] stated in an email message, “[The hired veteran claimed in the VETC] did not start working for [Taxpayer] until 13 May 2019.” . . .

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

Taxpayer continued to take the VETC on the Q3/19 and January 2020 tax returns, filed October 30, 2019, and February 14, 2020, respectively. On December 6, 2019, TAA made an additional request for information about VETC taken on the tax returns submitted. On February 19, 2020, TAA denied the VETC taken on the Q3/19 and January 2020 tax returns because [the hired veteran] was a governing member [of Taxpayer, as an LLC,] and not a qualifying employee.

Taxpayer disagreed with the Department's action. On March 9, 2020, [the governing member] submitted electronically the follow request for review [on behalf of Taxpayer]:

I have filed tax returns for [Taxpayer] for the past year. I am a veteran and my wife owns the company which is a sole proprietor LLC. I receive a monthly paycheck from the company for my services. As of late I have received notifications that we owe money to WA state because I cannot be counted as a Veteran hire and cannot take the veteran credit. I have reviewed the state statute and disagree with this ruling as I am not on the business LLC. I am a veteran and I do get paid by the company. It is irrelevant that the owner is also my spouse. Please let me know if you need more information and how this can be resolved.

Taxpayer's March 9, 2020, request for review disputed the denial of the VETC Taxpayer took for the employment of [the governing member]. Taxpayer's website . . . provides biographies for both [the governing member's wife] and [the governing member]. [The governing member's wife's] biography states [that she is the owner of Taxpayer and a military veteran].

...

[The governing member's] biography states [that he is the owner and manager of Taxpayer and that he is a military veteran.]

...

A review of the information available at the Washington Secretary of State's website disclosed that [prior to the periods at issue], . . . Taxpayer's Executor [(the governing member's wife)] filed a Certificate of Formation with the Washington Secretary of State's office creating Taxpayer, [as an LLC].

[The Executor] continued to file annual reports with the Secretary of State's office until the annual report filed [in] 2019, when [the governing member] filed the annual report. The annual report listed [the Executor and the governing member] as Governors. [The governing member] signed the electronic filing as "owner" attesting that: "This document is hereby executed under penalty of law and is to the best of my knowledge true and correct." *See* Taxpayer's 2019 Annual Report.

Once again, [in] 2020, [the governing member] filed the Taxpayer's annual report, which listed [the governing member] and [the Executor] as Governors.

ANALYSIS:

The Legislature enacted law providing for a Veteran's Employer Credit Program. Under the provisions of RCW 82.04.4498, businesses that hire a qualified employee for a position located in Washington for at least two consecutive full calendar quarters on or after October 1, 2016, and before June 30, 2022, may take a credit against their B&O tax. RCW 82.04.4498 defines terms in the statute, including "Qualified Employee" as follows:

(a)(i) "Qualified employee" means an unemployed veteran who is employed in a permanent full-time position for at least two consecutive full calendar quarters. For seasonal employers, "qualified employee" also includes the equivalent of a full-time employee in work hours for two consecutive full calendar quarters.

(ii) For purposes of this subsection (8)(a), "full time" means a normal workweek of at least thirty-five hours.

(b) "Unemployed" means that the veteran was unemployed as defined in RCW 50.04.310 for at least thirty days immediately preceding the date that the veteran was hired by the person claiming credit under this section for hiring the veteran.

(c) "Veteran" means every person who has received an honorable discharge or received a general discharge under honorable conditions or is currently serving honorably, and who has served as a member in any branch of the armed forces of the United States, including the national guard and armed forces reserves.

RCW 82.04.4498(8).

RCW 82.04.4498 also provides:

Credits earned under this section may be claimed only on returns filed electronically with the department using the department's online tax filing service or other method of electronic reporting as the department may authorize. No application is required to claim the credit, but the taxpayer must keep records necessary for the department to determine eligibility under this section including records establishing the person's status as a veteran and status as unemployed when hired by the taxpayer.

RCW 82.04.4498(6).

Not only must the employee be a qualifying veteran, but the VETC's requirement as to qualifying period and calculation must also be satisfied. The VETC includes a qualifying period. The qualifying period is from the date of hire of a qualified veteran to the end of the second consecutive full calendar quarter. *See* RCW 82.04.4498(2).

As quoted above, while no application is required to claim the credit, the taxpayer must keep records necessary for the department to determine eligibility under this section, including records establishing the person's status as a veteran and status as unemployed when hired by the taxpayer. RCW 82.04.4498(6).

In an email to TAA, [the governing member] stated: “I did not start working for [Taxpayer] until 13 May 2019.” Thus, by [his] own admission, his hiring would not have qualified for the VETC that Taxpayer claimed in 2017 or 2018, and for part of 2019. Taxpayer also has not provided information that [the governing member] was unemployed at the time Taxpayer hired him. More importantly, Taxpayer’s website and Taxpayer’s filings with the Washington State Secretary of State disclose that [the governing member] functioned as an owner and governor of the LLC and not as an employee. Taxpayer signed Taxpayer’s annual report as governor the annual report filed with the Washington Secretary of State [in] 2019. Taxpayer’s current website lists [the governing member] as owner.

The Department adopted WAC 458-20-105 (“Rule 105”) to assist in determining employment status. Under the provisions of Rule 105(8), “[a] corporation, joint venture, partnership, limited liability corporation, or any other group of individuals acting as a unit, is not an employee.” In this case, the question is whether an “owner” or “governor” is an employee of the Taxpayer, as an LLC. For that answer we look to other provisions contained within Rule 105. With respect to the factors indicating whether an individual is an independent contractor or employee, WAC 458-20-105 provides, in relevant part:

...

(3) Persons engaging in and operating a business. A person operating a business is a business entity that is engaging in business. The term “engaging in business” includes commencing, conducting, or continuing in business and also the exercise of corporate or franchise powers as well as liquidating a business when the liquidators thereof hold themselves out to the public as conducting such business. RCW 82.04.150. Engaging in business also includes the act of transferring, selling or otherwise dealing in real or personal property, or the rendition of services, for consideration except as an employee. The following conditions will serve to indicate that a person is engaging in and operating a business.

If a person is:

- (a) Holding oneself out to the public as engaging in business with respect to dealings in real or personal property, or in respect to the rendition of services;
- (b) Entitled to receive the gross income of the business or any part thereof;
- (c) Liable for business losses or the expense of conducting a business, even though such expenses may ultimately be reimbursed by a principal;
- (d) Controlling and supervising others, and being personally liable for their payroll, as a part of engaging in business;
- (e) Employing others to carry out duties and responsibilities related to the engaging in business and being personally liable for their pay;
- (f) Filing a statement of business income and expenses (Schedule C) for federal income tax purposes;
- (g) A party to a written contract, the intent of which establishes the person to be an independent contractor;
- (h) Paid a gross amount for the work without deductions for employment taxes (such as Federal Insurance Contributions Act, Federal Unemployment Tax Act, and similar state taxes).

(4) **Employees.** The following conditions indicate that a person is an employee.

If the person:

- (a) Receives compensation, which is fixed at a certain rate per day, week, month or year, or at a certain percentage of business obtained, payable in all events;
- (b) Is employed to perform services in the affairs of another, subject to the other's control or right to control, and includes hired household employees that may cook, clean, provide nanny-care, or grounds maintenance;
- (c) Has no liability for the expenses of maintaining an office or other place of business, or any other overhead expenses or for compensation of employees;
- (d) Has no liability for losses or indebtedness incurred in the conduct of the business;
- (e) Is generally entitled to fringe benefits normally associated with an employer-employee relationship, e.g., paid vacation, sick leave, insurance, and pension benefits;
- (f) Is treated as an employee for federal tax purposes;
- (g) Is paid a net amount after deductions for employment taxes, such as those identified in subsection (3) (h) of this rule.

Rule 105(2)-(4).

Tax benefits such as deductions, exemptions, and credits must be strictly construed, though fairly, and in keeping with the ordinary meaning of their language, against the taxpayer. *See, e.g., Budget Rent-a-Car, Inc. v. Dep't of Revenue*, 81 Wn.2d 171, 500 P.2d 764 (1972); *Group Heath Coop. v. Tax Comm'n*, 72 Wn.2d 422, 429, 433 P.2d 201 (1967); Det. No. 07-0034E, 26 WTD 212 (2007). "The burden of showing qualification for the tax benefit afforded . . . rests with the taxpayer." *Group Health*, 72 Wn.2d at 429. Thus, Taxpayer must prove it is entitled to the VETC.

Here, Taxpayer has failed to provide any documentation to support that [the governing member] [was a "qualified employee," such that the Taxpayer] qualified for the VETC. *See* RCW 82.04.4498(6). To the contrary, the information the Department has gathered from [the governing member], Taxpayer's website, and from other Washington State agencies indicates that [the governing member] is "engaged in and operating a business" as the governor and owner of Taxpayer LLC and is therefore not an employee. *See* Rule 105(3). Accordingly, we deny Taxpayer's petition.

DECISION AND DISPOSITION:

Taxpayer's petition is denied.

Dated this 28th day of April 2020.