BEFORE THE DIRECTOR
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition for Correction of Assessments of	)	F I N A L D E T E R M I N A T I O N
	)	No. 88-232A
. . .	)	Registration No. . . .
	)	. . . /Audit No. . . .
	)	. . . /Audit No. . . .

[1] **RULE 100(8), RCW 82.32.160:** APPEALS -- HEARINGS -- ENTITLEMENT -- DISCRETION. Under RCW 82.32.160 and WAC 458-20-100(8), the Department is vested with the discretion to grant or deny hearings. Any right to a hearing is vested in the Board of Tax Appeals or the Thurston County Superior Court.

[2] **RULE 19301**: B&O TAX -- EXEMPTION -- MULTIPLE ACTIVITIES -- INVALIDATION -- PROSPECTIVE APPLICATION -- POST-NATIONAL CAN/TYLER PIPE ASSESSMENTS. Taxes for earlier reporting periods which were not assessed until after the multiple activities exemption was determined to be unconstitutional by the U.S. Supreme Court on June 23, 1987 still fall within the prospective application of Tyler Pipe and can be collected by the state. Affirming Det. No. 88-232.

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.

NATURE OF THE ACTION:

This action arises out of an appeal of Det. No. 88-232 wherein the administrative law judge upheld the post-National Can assessment under the authority of National Can Corporation v. Department of

Revenue, 109 Wn.2d 878, 749 P.2d 1286 (1988) and Ashland Oil, Inc. v. Rose, 350 S.E. 2d 531 (W.Va. 1986).

FACTS:

Fujita, A.D. -- In 1987, the United States Supreme Court issued an opinion that struck down Washington's multiple activities exemption under RCW 82.04.440. Tyler Pipe Industries, Inc. v. Washington Department of Revenue, 483 U.S. ____, 97 L.Ed.2d 199, 107 S.Ct. 2810 (1987). The Court did not address the question of retroactive application; that issue was remanded to the state supreme court. In National Can Corporation v. Department of Revenue, supra, the court ruled that there would be no refunds and the decision would have prospective application only. The taxpayer questions whether the state court decision permits the Department to assess taxes after the U.S. Supreme Court decision. The taxpayer requests a hearing on this issue.

DISCUSSION:

[1] First, we address the taxpayer's request for a hearing. A taxpayer does not have a right to a hearing before the Department. In RCW 82.32.160, the Legislature provides:

> Any person having been issued a notice of additional taxes, delinquent taxes, interest, or penalties . . . may . . . petition the department . . . for a correction of the amount of the assessment, and a conference for examination and review of the assessment. . . . If a conference is granted, the department shall . . . [Emphasis added.]

The department administrative rule states:

> (8) The department may grant a conference for review of such petitions, fixing the time and place therefor and notifying the petitioner by mail. [Emphasis added.]

WAC 458-20-100.

By using the words "[i]f a conference is granted", it is evident that the legislature intended the Department to exercise its discretion to grant hearings where it deems some benefit might accrue from a conference. This discretion was vested with the Department, because administratively, the Department has a significant volume of appeals filed each year and it would be fiscally irresponsible to grant every taxpayer a hearing in cases where the department's position is so well established. For the reasons that follow, the taxpayer has not persuaded us that a hearing would be of any benefit; the arguments have not coaxed the Department to change its position. Therefore, we do not exercise our discretion to grant a hearing in this matter. Any further

review of the substantive issues presented herein may be had at the Board of Tax Appeals or the Thurston County Superior Court where a right to hearing in fact exists. RCW 82.03.190 and RCW 82.32.180.

[2] With respect to the substantive issue, we do rely upon dictum in the National Can Corporation v. Department of Revenue, supra at 891 which in part says:

> . . . Whether the taxes had been collected or still remain to be collected is not relevant to the issue of retroactive application. . . . [Emphasis added.]

You assert that the court meant "still remain to be collected" applies to only assessed amounts, a position based upon the factual situation of Ashland Oil, Inc. v. Rose, supra. We see this as a distinction without a difference and we refuse to adopt such a limiting effect. We hold that taxes accrued before June 23, 1987, the date of the U.S. Supreme Court decision, are properly due and assessable. We doubt that the court intended to create a windfall to those whose audit cycle was after the date of the U.S. Supreme Court decision and to force compliance upon those whose audit cycle was before the date of the U.S. Supreme Court's decision. We believe the better policy and the intent of our Court is to require taxpayers engaged in precisely the same activity at the same time period to bear exactly the same liability without regard to the fortuitous timing of the audit cycle.

DECISION AND DISPOSITION:

The taxpayer's Petition is denied.

DATED this 25th day of August 1988.