

Cite as 6 WTD 55 (1988)

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

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

RULE 19301: B&O TAX - EXEMPTION - MULTIPLE ACTIVITIES -INVALIDATION - PROSPECTIVE APPLICATION - POST-DECISION 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.

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

TAXPAYER REPRESENTED BY: . . .

NATURE OF ACTION:

Action concerning the collectibility of an assessment made after the multiple activities exemption was declared unconstitutional on June 23, 1987.

FACTS:

Burroughs, A.L.J. -- As a result of an audit covering the periods from June 1, 1982 to December 31, 1986 the taxpayer was assessed total tax due in the amount of \$. . . and

interest and penalties in the amount of \$. . . , for a total of \$ A companion audit covering the period from January 1, 1987 to May 18, 1987 resulted in an assessment of \$. . . and penalties in the amount of \$. . . , for a total of \$ These amounts have not been paid. Both assessments were issued after the multiple activities exemption was found unconstitutional by the U.S. Supreme Court.

The taxpayer, which earlier operated under other names and forms, was not registered prior to May 1987. The audits here at issue are a result of information collected with the cooperation of the taxpayer's representatives.

The taxpayer was a manufacturer which sold at wholesale and retail. Taxes were assessed on these activities, in addition to use taxes. The use taxes have been paid; the remaining taxes contained in these assessments have been appealed.

TAXPAYER'S EXCEPTIONS:

The taxpayer disagrees with the assessments, arguing that the taxes assessed were unconstitutional based on Tyler Pipe Industries, Inc. v. Washington State Department of Revenue, 107 S.Ct. 2810 (1987). In Tyler Pipe, the taxes here in issue were declared unconstitutional, and the case was remanded to the Washington State Supreme Court for a determination of appropriate damages (i.e., retroactivity).

In Tyler Pipe Industries, Inc. v. Washington State Department of Revenue, 109 Wash.2d 878 (1988), the Washington Supreme Court held that Washington State law did not require refunds and that prospective application would be appropriate.

The taxpayer relies on language in the Washington decision to support its argument that, even though refunds were denied by that Court, the Department should be prohibited from collecting taxes which had not already been assessed as of the date of the U.S. Supreme Court's decision invalidating the tax.

The taxpayer argues that the Washington Supreme Court set out three factors to consider in reaching its conclusion on whether to give retroactive or prospective effect to the U.S. Supreme Court's ruling of unconstitutionality: (1) whether the ruling establishes a new principle of law; (2) whether prospective operation will further or retard the purpose of the ruling; and (3) whether retroactive application of the ruling would result in inequity. In addressing the third

factor, the Washington Supreme Court's decision turned on its conclusion that the inequity of requiring the State to refund moneys that have already been spent outweighed the inequity of permitting the State to retain taxes unconstitutionally collected:

[T]he expenditures made from this revenue during the many years for which refunds are sought cannot be undone, and reimbursement at this point would pose a significant hardship upon the State's existing financial requirements. . . . Refunds sought in these cases alone exceed \$56 million and the State estimates refunds from 1980 through 1984 could be in excess of \$423 million. Given that reliance was justified by the presumptive validity of the tax statute and case law upholding that statute, retroactive application would be inequitable.

The taxpayer argues that no such hardship results from prohibiting the State from collecting taxes which were not even assessed as of the date of the U.S. Supreme Court's decision invalidating the tax, and that the taxes the State is attempting to collect in the assessments at issue have not been spent. The taxpayer points out that their collection will not result in a financial hardship to the State, but, instead, will result in the inequitable imposition of an unconstitutional tax.

DISCUSSION:

The Washington Supreme Court addressed this issue, stating:

. . . Because under Washington law a refund suit constitutes an adequate legal remedy foreclosing a preliminary injunction, it does not mean a successful taxpayer necessarily is entitled to retroactive application of his case. Taxpayers here were on notice that Washington and many other states afford prospective application to decisions finding tax statutes unconstitutional. . . . [citations omitted.] . . . Whether the taxes had been collected or still remained to be collected is not relevant to the issue of retroactive application. The Ashland¹ court explained that it was irrelevant

¹ Ashland Oil, Inc. v. Rose, 350 S.E.2d 531,535 (W.Va. 1986), dealt with the question of whether the ruling in Armco, Inc. V.

whether the disputed taxes had been paid or were simply assessed. . . . Both taxes collected and those assessed and unpaid fall within the prospective application of Armco and could be retained or collected by the State. (Emphasis added.)

Thus, the Court adopted the Ashland rationale that it made no difference whether the taxes had been paid or simply assessed, and that taxes which had been assessed could be collected prospectively. Neither the Ashland court or Tyler Pipe specifically addressed the question of the collectibility of those taxes which had not yet been assessed, since there were no parties representing that position.

The taxpayer has suggested that this agency issue a ruling which would grant tax relief to a taxpayer who has successfully evaded discovery of nonpayment of taxes until after issuance of Tyler Pipe, while those taxpayers who were actually issued tax assessments prior to the issuance of that decision are still liable for their payment. Such a ruling would result in the unequal treatment of similarly situated taxpayers, i.e., those who have National Can/Tyler Pipe tax liability accrued prior to the U.S. Supreme court decision based only on when that liability was discovered and assessed by the Department. Such disparate treatment would be clearly inappropriate. We therefore hold that taxes for earlier reporting periods which were not assessed until after the U.S. Supreme Court decision on June 23, 1987 still fall within the prospective application of Tyler Pipe, and can be collected by the state.

DECISION AND DISPOSITION:

The taxpayer's petition is denied.

DATED this 31st day of May 1988.

Hardesty, 467 U.S. 638 (1984), which had similarly declared a portion of the West Virginia gross receipts tax unconstitutional, should be retroactive or prospective.