

Cite as 10 WTD 278 (1990)

BEFORE THE DIRECTOR
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition)	<u>F I N A L</u>
For Correction of Assessment of)	<u>D E T E R M I N A T I O N</u>
)	
)	No. 89-188A
. . .)	Registration No. . . .
)	. . .\Audit No. . . .

[1] RULE 19301: RCW 82.04.440 -- MULTIPLE ACTIVITIES EXEMPTION -- INVALIDATION -- TYLER PIPE -- PROSPECTIVE APPLICATION. Tyler Pipe Indus., Inc. v. Department of Rev., 483 U.S. 232, 107 S.Ct. 2810, 97 L.Ed. 2d 199 (1987), which invalidated the multiple activities exemption of Washington's B&O tax, applies prospectively only. No distinction exists between taxpayers who paid their taxes before the decision and sought refunds, taxpayers who had outstanding but unpaid assessments before the decision, and taxpayers who had outstanding tax liabilities but had not yet been assessed.

[2] RULE 19301: RCW 82.04.440 -- B & O TAX -- INTERSTATE BUSINESSES -- TWO-WAY CREDITS -- INTERIM PERIOD -- RETROACTIVITY. The 1987 credit law applies retroactively to the period between June 23, 1987, the date Tyler Pipe was issued, and August 11th, 1987, the date the Legislature passed the credit law. American National Can Corp. v. Department of Rev., 114 Wn.2d 236 (1990), cert. den. 59 U.S.L.W. 3250 (1990).

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 ACTION:

In its letter of June . . ., 1989, the taxpayer appealed to the Director for a reversal of Determination 89-188, 7 WTD 289 (1989).

FACTS AND ISSUES:

Roys, Sr. A.L.J. -- Determination 89-188 sustained the assessment of taxes for a period prior to the United States Supreme Court decision in Tyler Pipe Industries, Inc. v. Department of Rev., 483 U.S. 232, 107 S.Ct. 2810, 97 L.Ed.2d 199 (1987)(Tyler Pipe). The taxpayer had argued that Tyler Pipe rendered the taxes uncollectible.

The taxpayer based its appeal of the Determination on the then pending decisions of the United States Supreme Court in McKesson and American Trucking Associations. Both cases involved the right to a refund of unconstitutional state taxes. The taxpayer asked that the Department put the matter on hold until it had the opportunity to reevaluate its position following those decisions.

DISCUSSION

In Tyler Pipe, the Court remanded the actions to the Washington Supreme Court to decide whether the State was obligated to pay refunds to the taxpayers. Determination 89-188 relied on the Washington Supreme Court's opinion that Tyler Pipe should be applied prospectively only. National Can Corp. v. Department of Rev., 109 Wn.2d 878 (1988), cert. den., 486 U.S. 1040, 108 S.Ct. 2030 (1988).

In making its decision, the Washington Supreme Court applied the test enunciated by the United States Supreme Court in Chevron Oil Co. v. Huson, 404 U.S. 97, 30 L.Ed. 2d 296, 92 S.Ct. 349, (1971). The Court determined that Tyler Pipe did establish new principles of law--the threshold factor necessary for prospective application. 109 Wn.2d at 882.

Both McKesson and American Trucking Associations were issued last June. American Trucking Associations, Inc. v. Smith, 495 U.S.____, 110 S.Ct. 2323 (1990) and McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, 495 U.S.____, 110 S.Ct. 2238 (1990). Neither of the decisions requires the Department to change its position.

In McKesson, the Court held that a taxpayer who is compelled to pay a tax that is later held to be unconstitutional under established Commerce Clause principles is entitled to meaningful retrospective relief. The Court did not hold that the only "meaningful" relief is a refund. In American Trucking Associations, Inc., the Court stated that when a state tax is held unconstitutional in a decision that

overturns established precedents, the state may apply the new decision prospectively.

The Washington Supreme Court noted that if it afforded retroactive application and ordered full refunds, taxpayers engaged in interstate commerce would not pay their fair share of the tax burden. "Forcing the State to collect no taxes for the entire period of the statute of limitations would be more in the nature of a punitive award for misconstruing the constitutionality of the B&O tax." 109 Wn.2d at 889.

Determination 89-188 quoted the portion of National Can which had applied the analysis of the West Virginia Supreme Court in Ashland Oil, Inc. v. Rose, 350 S.E.2d 531 (W.Va. 1986). Ashland had noted that it was irrelevant whether the disputed taxes had been paid or were simply assessed. Det. 89-188, p. 3, quoting National Can, 109 Wn.2d at 891. In Ashland Oil, Inc. v. Caryl, ___ U.S. ___ (June 28, 1990) (Slip. Op.), the United States Supreme Court relied on American Trucking Associations and reversed the West Virginia Supreme Court decision. Although the Court reversed Ashland and granted refunds, the reversal was not based on the fact the taxes remained to be collected.

While the original appeal of Ashland was pending, the Supreme Court decided Armco, Inc. v. Hardesty, 467 U.S. 638 (1984), which invalidated West Virginia's wholesale gross receipts tax, finding it discriminated against interstate commerce. In Ashland, the West Virginia Supreme Court had held that Armco did not apply retroactively and that the state could collect B&O taxes due for years preceding the date of the decision in Armco.

The Supreme Court reversed the judgment of the West Virginia Supreme Court because it held that its decision in Armco must be applied retroactively. The Court held that Armco did not meet the first prong of the Chevron Oil test because it did not "overrule clear past precedent nor decide a wholly new issue of first impression." Slip Op. p. 3.

In Ashland, however, the Court noted Justice Scalia's view that Tyler Pipe "overturn[ed] a lengthy list of settled decisions" and "revolutionize[d] the law of state taxation." 483 U.S. at 257 (Scalia, J., concurring in part and dissenting in part). Furthermore, as noted above, the Supreme Court dismissed the appeal from the Washington Court's determination that Tyler Pipe should not be applied retroactively. 486 U.S. 1040 (1988).

The statement in National Can that "[w]hether taxes had been collected or still remained to be collected is not relevant to the issue of retroactive application," remains valid. We agree with the conclusion stated in Det. 89-188 that there should be no distinction between taxpayers who paid their taxes before Tyler Pipe and sought refunds, taxpayers who had outstanding but unpaid assessments before the decision, and taxpayers who had outstanding tax liabilities but had not yet been assessed.

[2] The Washington Legislature passed the 1987 credit law on August 11, 1987. Laws of 1987, 2d Ex. Sess., ch. 3 (hereinafter 1987 credit law). The law was designed to remedy the constitutional defects of RCW 82.04.440 by replacing the "multiple activities exemption" with a "2-way credit." 1987 credit law, § 2. At the time Determination 89-188 was issued, the issue as to whether the 1987 credit law applied to the interim time period between the United States Supreme Court's partial invalidation of the tax on June 23, 1987, and the passage of the credit law on August 11, 1987, had not been resolved.

Last March, the Washington Supreme Court issued its opinion holding that the 2-way credit was constitutional and that the credits applied retroactively to the interim period. American National Can Corp. v. Department of Rev., 114 Wn.2d 236, (1990), cert. den., 111 S.Ct. (1990). Accordingly, the decision to uphold the tax during the interim period is also sustained.

DECISION AND DISPOSITION:

The taxpayer's petition is denied. We find that none of the recent United States Supreme Court decisions mandate a reversal of the Department's position that Tyler Pipe applied prospectively only.

Accordingly, Document No. . . . in the amount of \$. . . plus extension interest of \$. . . for a total of \$. . . is due by February . . ., 1991.

DATED this 23rd day of January, 1991.