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BEFORE THE DIRECTOR
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition For Correction on Notices of Balance Due of	)	SUPPLEMENTAL FINAL DETERMINATION
	)	No. 88-116A
. . .	)	Registration No. . . .

[1] **RULE 19301 AND RCW 82.32.440**: B&O TAX -- CREDITS (MATC) -- MULTIPLE ACTIVITIES -- GROSS RECEIPT TAXES -- DEFINITION -- EXCLUSION OF INCOME TAX -- CONSTITUTIONALITY -- ADMINISTRATIVE POWER. The Department of Revenue is without power to declare a statute unconstitutional. Bare v. Gorton, 84 Wn.2d 380, 526 P.2d 379 (1974).

[2] **RULE 19301 AND RCW 82.32.440**: B&O TAX -- EXEMPTION -- MULTIPLE ACTIVITIES -- CONSTITUTIONALITY -- TAXES DUE. The U.S. Supreme Court did not strike down the manufacturing tax or the selling tax; rather, it struck down the multiple activities exemption. Thus, after the decision on June 23, 1987, all taxes remained due and the remedy is to use the multiple activities tax credits (MATC). Tyler Pipe Indust., Inc. v. Washington Dept of Revenue, 483 U.S. ___, 97 L.Ed.2d 199, 107 S.Ct. 2810 (1987)

[3] **RULE 228 AND RCW 82.32.090:** PENALTIES -- INTEREST -- AMOUNT DUE -- COMPUTATION. Penalties for late payment are computed from the date determined to be due and are not in lieu of interest; interest can be assessed as well from the first day after the close of the calendar year in which the taxes were accrued.

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:

On February 25, 1988, a Final Determination was issued denying this taxpayer relief as a result of a series of "Notice of Balance Due" sent to the taxpayer. The Department extended due dates for payment and now this taxpayer seeks reconsideration based upon arguments not earlier considered by the Director when he issued his Final Determination. While the Department does not generally entertain motions for reconsideration, the Director responds to the petition because of the importance of the legal issues presented.

DISCUSSION:

Fujita, A.D. -- The reporting period in question began on July 1, 1987 and ended on December 31, 1987. The first claim advanced is that the legislative "fix" of credits is unconstitutional under the Commerce Clause as well as the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the United States Constitution. The basis of this claim is that the legislation does not allow credits "for other similarly imposed taxes on income or receipts, such as state and local net income taxes."

[1] The taxpayer's summation of RCW 82.04.440 is accurate. The legislative "fix" provides for a credit from this state's gross receipts taxes but only for gross receipts taxes paid in other jurisdictions. A definition of "gross receipts taxes", for purposes of the credit, was adopted by the legislature, to wit:

> "Gross receipts tax" means a tax:
>
> (i) Which is imposed on or measured by the gross volume of business, in terms of gross receipts or in other terms, and in the determination of which the deductions allowed would not constitute the tax an income tax or value added tax;

RCW 82.04.440(4).

It is clear that the statute excludes "other, similarly imposed taxes . . ., such as state and local net income taxes" from the definition of a gross receipts tax. This exclusion is the heart of the taxpayer's complaint about the credit provisions. However, whether this statute is in violation of the United States Constitution is beyond our review. "An administrative body does not have authority to determine the constitutionality of the law it administers; only the courts have that power." Bare v. Gorton, 84 Wn.2d 380, 383, 526 P.2d 379 (1974).

[2] The taxpayer also petitions for a refund of the 5% penalty assessed on the late payment of taxes. The taxpayer argues that the penalty was based upon amounts not yet due. The taxpayer relies upon the case of Tyler Pipe Indust., Inc. v. Washington Dept of Revenue, 483 U.S. ___, 97 L.Ed.2d 199, 107 S.Ct. 2810 (1987) which struck down the multiple activities exemption. The resulting

legal import of the case was a determination that a portion of the B&O tax was constitutionally infirm. Since the remedy was remanded to the state court, the taxpayer contends that the amount due could not be determined until the issue of a remedy was determined.

We disagree. The court's delegation was on the question of refunds for taxes paid before June 23, 1987. The court did not leave the period after June 23, 1987 in question. The Department issued press releases on its interpretation of the U.S. Supreme Court case. It also sent notices to registered taxpayers that it considered the taxes to be due under these circumstances; that a penalty would be assessed if payment was not made; and that a taxpayer's insistence of no liability would be done at the taxpayer's peril.

The United State Supreme Court did not strike down the manufacturing tax or the selling tax; rather, it struck down the multiple activities exemption. The result is that all taxes, without an exemption for multiple activities, are due. The legislative credit fix is consistent with that analysis as it provided for credits in situations where a taxpayer may have paid another gross receipts tax, whether in state or out, on another taxable activity. In this case, if the taxpayer has paid a gross receipts tax to another jurisdiction, its remedy is to take a credit for such taxes, not withhold payment. This true, because as we earlier stated, the tax in question was always due and had not been struck down by the court.

[3] Finally, the taxpayer argues that in the event that we conclude that tax is due, the Department should have assessed interest not penalties. The taxpayer relies on the fact that the notice was generated by a file audit and thus, only RCW 82.32.050 (the provision for interest) should apply. We again disagree; in fact, the Department should have assessed both. Penalties are not in lieu of interest or visa versa. We believe that both can be due at the same time when certain facts supporting the assessment of each are present. That is the case here. When the notices were issued, they provided for a 5% penalty under RCW 82.32.090 since the taxes were not paid by the normal monthly due date. These "failure to pay" provisions are found in RCW 82.32.090. Further, once the amounts due matured for the current year, it would then have been appropriate to add interest beginning on January 1, 1988 in addition to the tax and penalty claimed to be due in the notice. However, since the Department did not assess interest, we do not now disturb that decision.

For these reasons, the petition is denied.

DATED this 22nd day of July 1988.