Cite as Det. No. 91-030ER, 12 WTD 315 (1991).

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

In the Matter of the Petition For Correction of Assessment of	)	F I N A L D E T E R M I N A T I O N
	)	No. 91-030ER
. . .	)	Registration No. . . .
	)	. . ./Audit No. . . .
	)	. . ./Audit No. . . .

[1] RULE 19301 -- B&O TAXES -- INVALIDATION -- TYLER PIPE -- RETROACTIVITY -- POST DECISION ASSESSMENTS. 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. Accord: Martin Nygaard Logging Company and Nygaard Logging Inc, v. Department of Revenue, BTA Docket No. 91-10, (1991).

[2] RULE 193B: B&O TAX -- NEXUS -- DISSOCIATION OF -- FRANCHISED DEALERSHIPS -- PRE-DELIVERY PREPARATORY WORK. Dissociation not allowed where the taxpayer shipped automobiles to Washington franchised dealerships for pre-delivery preparatory work before delivering the vehicles to the customer.

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.

DATE OF EXECUTIVE TELECONFERENCE: . . .
(Constitutional Issues)

TAXPAYER REPRESENTED BY: . . .

DATE OF RECONSIDERATION TELECONFERENCE: . . .

(Audit Adjustments Issues)

TAXPAYER REPRESENTED BY: . . .

NATURE OF ACTION:

The taxpayer petitions for executive level reconsideration of the Departments ruling in Det. No. 91-030 that rejected the taxpayer's constitutional argument and sustained the imposition of wholesaling B&O tax on taxpayer's sales to Washington customers. In addition, the taxpayer appeals the auditor's interpretation of Det. No. 91-030 and his refusal to allow the taxpayer to dissociate certain vehicle sales to the Federal government. For purposes of administrative efficiency, the two appeals have been consolidated and will be decided by this single determination. This matter has been given executive level consideration as evidenced by the signature of the Assistant Director of the Interpretation and Appeals Division.

FACTS:

Okimoto, A.L.J. -- [Taxpayer] operates an automobile manufacturing plant . . . . Its books and records were examined by a Department of Revenue (Department) auditor for the period January 1, 1984 through June 30, 1988. As a result of this Audit examination, Document Nos. . . . and . . . were issued for additional taxes and interest owing in the amounts of $ . . . and $ . . . , respectively. The taxpayer appealed the assessments and was granted partial relief in Det. No. 91-030 and the file was remanded to the Audit Division. Pursuant to the holding in Det.No. 91-030 the auditor made adjustments in the assessments and Document Nos. . . . and . . . were issued for additional taxes and interest owing in the amounts of $ . . . and $ . . . [in June 1992]. The taxpayer has appealed the revised assessments and they remain due.

TAXPAYER'S EXCEPTIONS:

B&O Tax Constitutionally Invalid.

In its initial petition, the taxpayer argued that the assessments should be overturned because the Department was attempting to assess and collect an invalid or illegal tax. The taxpayer argued that the U.S. Supreme Court's decision in Tyler Pipe Industries, Inc. v. Washington State Department of Revenue, 483 U.S. 232, 107 S.Ct. 2810, 97 L.Ed.2d 199 (1987) invalidated all or portions of the Washington State Business and Occupation tax in effect prior to June 23, 1987 thereby making any assessment of B&O taxes during that period invalid. The taxpayer attempted to distinguish its case from the subsequent Washington State Supreme

Court's, ruling in National Can Corp. v. Department of Rev., 109 Wn.2d 878 (1988), cert. den., 486 U.S. 1040, 108 S.Ct. 2030 (1988) (hereafter referred to as "National Can II") which denied retroactive application of the invalidation because the taxpayer's tax assessments were issued after the United States Supreme Court had declared the tax scheme invalid.

Relying on National Can II, the Administrative Law Judge rejected the taxpayer's arguments in Det. No. 91-030 and sustained the assessments.

On reconsideration, the taxpayer argues that the holding by the Washington State Supreme Court in National Can II, has been effectively overruled by the United States Supreme Court in its line of cases beginning with McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, 496 U.S. 18, 110 S.Ct. 2238 (1990) and ending with James B. Beam Distilling Co. v. Georgia, 501 U.S.____, 111 S.Ct. 2439 (1991).

Dissociation of Government Sales.

In the event that the Department denies the taxpayer's appeal for reconsideration based on the constitutional issue, the taxpayer also argues that the auditor incorrectly interpreted the holding of Det. No. 91-030 regarding the taxpayer's ability to dissociate sales made by its Government Sales Office. In its original petition, the taxpayer's representative stated that:

> The sales to the federal government are consummated at our Washington, D.C., office, usually directly with the GSA (General Service Administration), or similar federal agency, and the vehicles are consigned to various locations, such as military installations, or other federal facilities, throughout the United States. Unlike, sales of vehicles to state and local governments, there is no franchised dealer participation in the bid or sales process, or the purchase of these vehicles, since the transaction is solely between [the taxpayer] and the United States government.
>
> The office from which these sales are made, which is referred to as our "Government Sales Office," does not engage in any local activity within the State of Washington, either th[r]ough its own employees, or any other means of representation or agent. It has no branch office, outlet, or any other place of business in the State of Washington. Further, it has no ability to accept orders directly from anyone in the State of Washington, or, in fact, to solicit orders, since all

> business is conducted at the national level th[r]ough its Washington, D.C. office.
>
> The "Government Sales Office," does not have anyone visiting any location within the State of Washington, either on a regular or periodic basis for any purpose, and it does not attempt to maintain a market by any means within the State of Washington, through its own efforts, or through the efforts of anyone else.

(Emphasis ours.)
Based on these representations that there was no franchised dealership participation in the bid, sales or purchasing process of government vehicles, the Administrative Law Judge held that the taxpayer was entitled to dissociate these sales. On remand, the auditor discovered that as of April 1986, [the taxpayer] began delivering non-military government vehicles directly to [taxpayer] dealerships for pre-delivery preparatory work and subsequent delivery to U.S. Government agencies. The auditor believed that this additional instate activity by a representative of the taxpayer negated its ability to dissociate these government sales. Accordingly, the auditor refused to allow dissociation.

The taxpayer contends that the approximately $200 worth of dealer preparatory work done on each vehicle within the state of Washington by franchised dealerships is insufficient activity to support a finding of nexus. The taxpayer argues that the United States Supreme Court requires a finding of substantial nexus for each transaction.

ISSUES:

1. Has the holding of the Washington State Supreme Court in "National Can II" been effectively overruled by the United States Supreme Court in that Court's most recent cases?

2. If not, may the taxpayer dissociate sales made by its Government Sales Office where the taxpayer ships the vehicles to independent franchised dealerships located in Washington for dealer-prep work prior to delivery to the government?

DISCUSSION:

[1] In National Can Corp. v. Department of Revenue, 109 Wn.2d 878, appeal dismissed, cert. denied, 486 U.S. 1040 (1988) ("National Can II"), the Washington Supreme Court held that the United States Supreme Court's decision in Tyler Pipe Indus., Inc., v. Department of Rev., 483 U.S. 232, 97 L. Ed. 2d 199, 107 S. Ct. 2810 (1987), applies prospectively only.

Although the taxpayer contends that the U.S. Supreme Court effectively overruled "National Can II", in James B. Beam Distilling Co. v. Georgia, 510 U.S ____, 115 L.Ed 2d 481 (1991) and Ashland Oil, Inc. v. Caryl, 111 L. Ed. 2d. 734 (1990), we disagree. On the contrary we believe that the holding in James Beam is consistent with "National Can II" and did not expressly or impliedly overrule that case. Therefore, it provides no support for the taxpayer's argument.

James Beam involved the constitutionality of an excise tax imposed by the state of Georgia on imported liquor at a rate double that imposed on liquor manufactured from Georgia-grown products. In 1984 the Supreme Court had previously held that a similar Hawaii law had violated the Commerce Clause in the case Bacchus Imports, Ltd. v. Dias, 468 U.S. 263 (1984). James Beam then filed an action in Georgia state court, seeking a refund of taxes previously paid. The state court held the law unconstitutional but refused to apply the ruling retroactively, relying on Chevron Oil Co. v. Huson, 404 U.S. 97, (1971). In reversing the Georgia state court and applying the ruling retroactively, Justice Souter stated for the Court:

> ... Bacchus is fairly read to hold as a choice of law that its rule should apply retroactively to the litigants then before the Court. Because the Bacchus opinion did not reserve the question whether its holding should be applied to the parties before it, ... it is properly understood to have followed the normal rule of retroactivity application in civil cases. James Beam, 111 S.Ct at 2445

Justice Souter then clarified that:

> The grounds for our decision today are narrow. They are confined entirely to an issue of choice of law: when the Court has applied a rule of law to the litigants in one case it must do so with respect to others not barred by procedural requirements or res judicata. We do not speculate as to the bounds or propriety of pure prospectivity.

(Emphasis ours.) James Beam, 111 S. Ct. at 2448.

The opinion in this case thus stands for the narrow holding that, when the United States Supreme Court has already applied a rule of law to the litigants in one case (such as Bacchus), the same rule of law also should be applied to similarly situated litigants (such as James Beam) whose cases were not final at the time of the decision.

The taxpayer here is similarly situated with the litigants in Tyler Pipe and therefore the holding of James Beam requires only that they be treated similarly. The litigants in Tyler Pipe were denied retroactive tax relief and granted only the prospective and curative statutory credits of RCW 82.04.440. Accordingly, the taxpayer's remedy, like the Tyler Pipe litigants is similarly limited to the prospective and curative statutory credits of RCW 82.04.440. Retroactive tax relief for B&O taxes, paid or unpaid, relating to any periods before June 23, 1987 is neither required nor appropriate under the holding of James Beam.

Nor do we agree with taxpayer's argument that because the taxes assessed in its assessments are still unpaid as opposed to having already been paid is material. This distinction was expressly rejected by the Washington State Board of Tax Appeals in the case Martin Nygaard Logging Company and Nygaard Logging Inc, v. Department of Revenue, Docket No. 91-10, (1991). In that case the Board expressly stated:

> We find no rational basis for distinguishing among (1) taxpayers who timely paid their B&O taxes before Tyler Pipe, (2) taxpayers who were assessed but had not yet paid their taxes when the decision was issued, and (3) taxpayers who had outstanding tax liabilities but had not yet been assessed when the decision was issued. Whether Appellants are entitled to any relief based on the Tyler Pipe decision depends on when the extracting activities occurred for which they were taxed. To rule otherwise would allow those who comply with a tax law to be taxed, while those who did not comply escape their tax obligation.

Therefore, we must deny the taxpayer's petition on this issue.

[2] The ruling in Det. No. 91-030 that allowed the taxpayer to dissociate sales made by its Government Sales Office was clearly based and conditioned upon the facts presented by the taxpayer in its original petition. On remand, both the auditor and the taxpayer's representative . . . agreed that a different set of facts occurred for a significant portion of the audit period. Accordingly, we must now rule on the dissociation issue based on these new facts.

WAC 458-20-193B (Rule 193B) was the lawfully promulgated rule covering the taxability of sales of goods originating out-of-state and delivered to persons in Washington that was in effect during the audit period. It has the full force and effect of law unless declared invalid by the judgment of a court of record not

appealed from. RCW 82.04.300. Rule 193B stated in pertinent part:

> RETAILING, WHOLESALING. Sales to persons in this state are taxable when the property is shipped from points outside this state to the buyer in this state and the seller carries on or has carried on in this state any local activity which is significantly associated with the seller's ability to establish or maintain a market in this state for the sales. If a person carries on significant activity in this state and conducts no other business in this state except the business of making sales, this person has the distinct burden of establishing that the instate activities are not significantly associated in any way with the sales into this state. The characterization or nature of the activity performed in this state is immaterial so long as it is significantly associated in any way with the seller's ability to establish or maintain a market for its products in this state. The essential question is whether the instate services enable the seller to make the sales.
>
> Applying the foregoing principles to sales of property shipped from a point outside this state to the purchaser in this state, the following activities are examples of sufficient local nexus for application of the business and occupation tax:
>
> ...(5) Where an out-of-state seller, either directly or by an agent or other representative, performs significant services in relation to establishment or maintenance of sales into the state, the business tax is applicable, even though (a) the seller may not have formal sales offices in Washington or (b) the agent or representative may not be formally characterized as a "salesman."
>
> ...Under the foregoing principles, sales transactions in which the property is shipped directly from a point outside the state to the purchaser in this state are exempt only if there is and there has been no participation whatsoever in this state by the seller's branch office, local outlet, or other local place of business, or by an agent or other representative of the seller. A franchise or credit investigation of a prospective purchaser and/or recommendation or approval by a local office upon which subsequent transactions are based is such a utilization of the local office as to render such subsequent transactions taxable.

(Emphasis ours.)

The ALJ found in Det. No. 91-030 that the independent franchised dealerships acted as agents of the taxpayer in soliciting sales of service contracts thus creating nexus for those sales or services. We similarly find that the $200 worth of pre-delivery preparatory work done on each vehicle by these same dealerships, constitutes sufficient local participation in the sales and bid process for vehicles being sold by the taxpayer's out-of-state Government Sales Office to negate its ability to dissociate these sales. Accordingly, the taxpayer's petition is denied on this issue.

Finally, during the course of settlement negotiations, the taxpayer has recently claimed that it has discovered/uncovered sales transaction records which would, on their face, satisfy WAC 458-20-193B requirements for exemption. These documents have not previously been made available to the Department for examination and review.

Accordingly, we will remand the taxpayer's file to the Audit Division for the examination and decision as to the validity of the documentation presented. After examining the documentation submitted, the Audit Division will make the appropriate adjustments and issue an amended assessment as required. . . . .

DECISION AND DISPOSITION:

Accordingly, the taxpayer's petition on the National Can issue is denied. The case will be remanded to the Audit Division for review of sales records and to make the appropriate adjustments in accordance with this determination.

DATED this 11th day of January 1993.