Cite as Det. No. 13 WTD 1 (1993).

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

In the Matter of the Petition For Reconsideration of Det. No. 86-31(A) and etc.	)	D E T E R M I N A T I O N No. 86-31ER
. . .	)	Registration No. . . .
	)	Audit No. . . .
	)	. . ./Audit No. . . .
	)	. . ./Audit No. . . .

[1] RULE 19301 -- B&O TAXES -- TYLER PIPE -- RELIEF AVAILABLE -- NATIONAL CAN II. The holding by the Washington State Supreme Court in "National Can II" has not been effectively overruled by the United States Supreme Court in its recent line of cases. The relief available for Tyler Pipe-type litigants remains limited to prospective application and the credit fix.

[2] MISC -- RES JUDICATA -- ELEMENTS -- SEPARATE CAUSES OF ACTION. To make a judgment res judicata in a subsequent action there must be a concurrence of identity in four respects; (1) of subject-matter; (2) of cause of action; (3) of persons and parties; and (4) in the quality of the persons for or against whom the claim is made. Where the causes of actions are not identical, the doctrine of res judicata does not apply.

[3] RULE 193B -- B&O TAX -- NEXUS -- DISSOCIATION OF -- BURDEN OF PROOF. Claim of dissociation denied where the taxpayer failed to establish facts sufficient to allow dissociation of sales by other divisions.

[4] RULE 228 -- INTEREST -- WAIVER -- SETTLEMENT OFFER -- FAILURE TO RESPOND. Extension interest on an audit assessment was waived where the Department failed to respond to a written settlement offer within a reasonable time.

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:

A taxpayer protests additional B&O taxes and interest assessed upon the taxpayer for three separate audit periods. Three separate audit assessments are involved.

FACTS:

Okimoto, A.L.J. -- [The taxpayer] is a multi-division out-of-state seller of property and services. An audit of taxpayer's books and records was conducted by a Department of Revenue (Department) auditor for the period January 1, 1980 through December 31, 1984 which resulted in Tax Assessment No. . . . being issued [in November 1985]. For purposes of this determination, this assessment will be referred to as the "1985 assessment." The assessment was timely appealed on the grounds that the transactions were exempt under WAC 458-20-193B and WAC 458-20-246, and that the tax being assessed was unconstitutional. Final Determination No. 86-31 was issued without a hearing by the Assistant Director of the Interpretation and Appeals Division [in January 1986] denying total relief.

After the issuance of Final Determination 86-31, the taxpayer objected to the dismissal of its petition contending that other substantive issues in addition to the "unconstitutional tax" issue needed to be decided and that the taxpayer had not been given its fair opportunity to argue its case on these other issues. As a matter of fairness to the taxpayer, the Department vacated Final Determination No. 86-31 by issuing Final Determination No. 86-31(A), and allowed the taxpayer time to refile its petition, which it did [in March 1986]. The taxpayer's new petition again raised the "illegal tax" argument, and also a res judicata argument.

A hearing was scheduled [in June 1986] but was later postponed to allow the taxpayer time to submit additional information and/or written briefs. The hearing was eventually rescheduled for and held [in November 1988]. At the conclusion of the hearing, the taxpayer made an oral settlement proposal. A formal written settlement offer was received by the Department [in March 1989], which the Department took under advisement. No further activity occurred until December of 1992, when the Department reinstituted settlement negotiations on the 1985 assessment.

During the intervening period, the Department's Audit Division had performed another audit examination of the taxpayer's records covering the period January 1, 1985 through December 31, 1990. As a result of this examination, Audit Nos. . . . (hereafter referred to as the 1991 assessments) were issued [in December 1992]. Settlement negotiations attempting to incorporate the 1991 assessments into the previously negotiated terms of the 1985 settlement offer continued through approximately June 30, 1993, but without success. Consequently, we must now decide the appeals of both the 1985 and 1991 tax assessments based on the petitions, audit reports, hearing notes and all additional supplemental information supplied by the taxpayer.

Because of the identical nature of the parties involved, and the similar nature of the issues, the appeal from Final Det. No. 86-31(A) and the appeals of the 1991 tax assessments are being consolidated into this final executive level determination.

TAXPAYER'S EXCEPTIONS:

1985 Tax Assessment:

In its initial and subsequent petitions, the taxpayer argued that the assessment 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, (1987) invalidated all or portions of the Washington State B&O tax prior to June 23, 1987, thereby making any tax assessment of B&O taxes for that period invalid. The taxpayer has attempted to distinguish its case from the subsequent ruling of the Washington State Supreme Court in National Can Corp. v. Department of Rev., 109 Wn.2d 878 (1988), cert. den., 486 U.S. 1040, (1988) (hereafter referred to as "National Can II") which applied the Tyler Pipe ruling prospectively.

In addition, the taxpayer argued 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, (1990), James B. Beam Distilling Co. v. Georgia, 501 U.S. ____, (1991) and ending with the recently decided case of Harper v. Virginia, ___ U.S. ___,(1993).

Second, the taxpayer argues that the Washington Courts have already decided the total B&O tax liability of the taxpayer for the years 1980 - 1984 in the taxpayer's refund suit involving the constitutionality of the B&O tax. Therefore, since the

Department failed to file a counterclaim for additional B&O taxes due for those years, the taxpayer argues that it is now barred from assessing additional taxes under the doctrine of "res judicata."

Also, in the audit report, the auditor assessed B&O taxes on wholesale sales made to Washington customers by each of the following divisions. The auditor detailed the facts upon which he made his nexus determination in his audit report as follows:

> [A] - solicitation of sales by non-resident employees and local independent agents.
> [B] - Payroll expense aggregating approximately $ . . . in 1982 and $ . . . in 1984; rent expense approximating $ . . . in 1984.
> [C] - Resident employees, inventory and the rental of equipment to a manufacturer throughout the audit period; fixed assets aggregating approximately $ . . . at the beginning of 1980 and $ . . . at the end of 1980.
> [D] - Manufacturing plant in . . . , Washington, solicitation of sales by resident employees and maintenance of inventory throughout the audit period.
> [E] - Solicitation of sales by resident personnel, and independent agents, inventory, rental of equipment to customers, rent expense, and fixed assets throughout the audit period.
> [F] - Sale solicitation by local independent agents and maintenance of inventory throughout the audit period.
> [G] - Maintenance of a sales office and inventory in [Washington].
> [H] - Maintenance of an inventory during 1980, 1981, 1982 and 1983.
> [I] - Solicitation by local independent agents and non-resident independent agents.

The taxpayer concedes nexus on sales made by certain divisions, but argues that it can dissociate other divisional sales from the nexus creating activity.

Finally, the taxpayer requests that audit and extension interest be waived.

1991 Tax Assessments:

The only issue appears to be the assessment of a B&O tax that has been declared unconstitutional for periods prior to August of 1987.

ISSUE:

1. Has the recent case by the United States Supreme Court in Harper v. Virginia, ___ U.S. ___,(1993) effectively overruled National Can Corp. v. Department of Revenue, 109 Wn.2d 878, appeal dismissed, cert. denied, 486 U.S. 1040 (1988) ("National Can II")?

2. Should the taxpayer be allowed to dissociate sales by other divisions from the nexus created by its manufacturing plant and an instate sales office?

3. Is the state barred by the doctrine of res judicata from assessing additional unreported B&O taxes in the 1985 audit assessment?

4. May extension interest on an audit assessment be waived where the Department fails to respond to a written settlement offer within a reasonable period?

DISCUSSION:

B&O Tax Constitutionally Invalid.

[1] We disagree with the taxpayer's contention that the ruling by the United States Supreme Court in Harper v. Virginia, ___ U.S. ___,(1993) effectively overrules National Can Corp. v. Department of Revenue, 109 Wn.2d 878, appeal dismissed, cert. denied, 486 U.S. 1040 (1988) ("National Can II").

In a case decided prior to Harper, the U.S. Supreme Court had held that a state that exempted state and local employee's retirement benefits from state income taxation while not exempting federal retirement benefits violated the constitutional doctrine of intergovernmental tax immunity Davis vs. Michigan Dept. of Treasury, 489 U.S. 803 (1989). After this ruling, the petitioners in Harper sought a refund of taxes "erroneously or improperly assessed" under a similar tax exemption allowed by the state of Virginia contending that the exemption violated Davis's nondiscrimination principle. The Virginia trial court applied the factors set forth in Chevron Oil Co. v. Huson, 404 U.S. 97 (1971) to conclude that no retroactive relief was required. This was sustained on appeal by the Supreme Court of Virginia, 241 Va. 232, (1991). The U.S. Supreme Court accepted certiorari, vacated the judgment and remanded the case for further consideration in light of that Court's recent decision in James B. Beam Distilling Co. v. Georgia, 501 U.S.___(1991).

On remand, the Supreme Court of Virginia again denied retroactive tax relief, and the U.S. Supreme Court granted certiorari for a second time. Although the Court reversed the Supreme Court of Virginia and required retroactive application of the federal rule

of law announced in Davis, the Court also stated that the normal rule of "retroactive application" would not apply if the U.S. Supreme Court had reserved to itself the questions of retroactivity and remedy. Harper supra, (slip op. at 9) We believe that the U.S. Supreme Court has, in fact, reserved these two issues to itself in the Tyler Pipe case.

In Tyler Pipe, the U.S. Supreme Court partially invalidated the state of Washington's B&O taxing statutes and remanded the case back to the Washington State Supreme Court for consideration of the remedial issues. On remand, the Washington State Supreme Court held that the United States Supreme Court's decision in Tyler Pipe applied prospectively only and that no refunds were due. National Can Corp. v. Department of Revenue, 109 Wn.2d 878, (1988). The taxpayer appealed this decision to the U.S. Supreme Court, but certiorari was denied and the appeal dismissed in 486 U.S. 1040 (1988). By denying certiorari to the litigants in "National Can II," the U.S. Supreme Court has limited the relief available to Tyler Pipe-type litigants to the remedy granted by the Washington Supreme Court in that case, (ie. prospective application and the credit fix). Furthermore, once this rule of law and its accompanying remedy has been determined and applied to the litigants in the Tyler Pipe case, it must be applied to all similarly situated taxpayers. James B. Beam, supra.

Accordingly, we believe that the holding in Harper 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.

Res Judicata

[2] The Washington State Supreme Court has recognized the doctrine of res judicata as follows.

> To make a judgment res judicata in a subsequent action there must be a concurrence of identity in four respects; (1) of subject-matter; (2) of cause of action; (3) of persons and parties; and (4) in the quality of the persons for or against whom the claim is made. Bordeaux v. Ingersoll Rand Co., 71 Wn.2d 392, (1967).

In the taxpayer's refund action, the sole issue in dispute was the constitutional validity of the B&O taxes that the taxpayer had already paid. The issue of whether the taxpayer had correctly paid all B&O taxes due under Washington's taxing statutes was not an issue. Therefore, since the cause of actions were not identical, the doctrine of res judicata does not apply. Accordingly, the taxpayer's petition is denied on this issue.

Dissociation of Sales.

[3] Taxpayer readily concedes that it has established nexus with the state of Washington through the establishment of a . . . manufacturing plant in [Washington] for its [D Division], and a sales office for its [B Division] in . . . , Washington. The taxpayer argues, however, that it can dissociate sales made by other Divisions from these nexus creating activities. It further argues that the sales solicitation by independent agents of other Divisions is insufficient to create nexus for those divisions.

The burden to dissociate sales is exclusively that of the taxpayer and it is not easily satisfied:

> But when, as here, the corporation has gone into the State to do local business by state permission and has submitted itself to the taxing power of the State, it can avoid taxation on some Illinois sales only by showing that particular transactions are dissociated from the local business and interstate in nature. The general rule, applicable here, is that a taxpayer claiming immunity from a tax has the burden of establishing his exemption. Norton Company v. Illinois Department of Revenue, 340 U.S. 534, 537 (1951).

When considering the issue of dissociation, the Courts have placed the burden of coming forth with sufficient facts that would establish dissociation, entirely upon the taxpayer. Norton, supra.

Based on the facts presented, we do not believe that the taxpayer has met the burden of dissociation. Accordingly, the taxpayer's petition is denied on this issue.

[4] RCW 82.32.105 allows the Department to waive or cancel interest if the failure of a taxpayer to pay any tax by the due date was the result of "circumstances beyond the control of the taxpayer."

Rule 228 which implements the statute lists the two situations under which interest may be waived. It states in part:

> The following situations will constitute circumstances under which a waiver or cancellation of interest upon assessments pursuant to RCW 82.32.050 will be considered by the department:
>
> 1. The failure to pay the tax prior to issuance of the assessment was the direct result written instructions given the taxpayer by the department.

> 2. Extension of the due date for payment of an assessment was not at the request of the taxpayer and was for the sole convenience of the department.

(Emphasis ours.)

We have reviewed the facts and find generally that the taxpayer's failure to pay the assessed taxes were not due to circumstances beyond the control of the taxpayer. The only exception to this was during the time after the Department had received a written settlement offer from the taxpayer and failed to timely respond to that offer. Although the facts are unclear and incomplete as to what communication occurred during this period, we will give the taxpayer the benefit of the doubt and conclude that the Department "failed to timely respond" on this settlement offer. In general, we believe that a taxpayer is entitled to a timely answer to a written settlement offer and where the Department's failure to respond causes unreasonable delay, such unreasonable delay constitutes an "extension of the due date for payment of an assessment... for the sole convenience of the department." Accordingly, extension interest on Tax Assessment No. . . . shall be waived for the period commencing [in March 1989], when the written settlement offer was made, until [November 1992] when settlement negotiations were reinstituted. The taxpayer's petition is partially granted on this issue.

DECISION AND DISPOSITION:

The taxpayer's petition for correction of assessment is denied.

This Determination results from an executive level review of the issues in controversy, as shown by the signature of the Assistant Director, executive designee of the Director. Therefore, it constitutes the final action by the Department of Revenue regarding the legal issues raised in Det. No. 86-31A and the accompanying 1991 tax assessments.

You may now file a petition with the Board of Tax Appeals [PO Box 40915, Olympia, WA 98504-0915] pursuant to RCW 82.03.190. If you choose to undertake this further appeal, your petition must be filed with the Board within thirty (30) days of this final determination.

In the alternative, you may pay the entire tax assessment and petition for a refund in Thurston County Superior Court in accordance with RCW 82.32.180.

DATED this 30th day of July of 1993.