

Cite as 5 WTD 93 (1988)

BEFORE THE DIRECTOR  
DEPARTMENT OF REVENUE  
STATE OF WASHINGTON

In the Matter of the Petition  
for Correction on Notices  
of Balance Due of

. . .

) F I N A L  
) D E T E R M I N A T I O N  
)  
) No. 88-40  
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) Reg. No. BM600 498 804  
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- [1] **RCW 82.04.440: B&O -- EXEMPTION -- MULTIPLE ACTIVITIES -- INVALIDITY -- REFUND.** For periods beginning before June 23, 1987, no refunds are granted. *Tyler Pipe Indus. v. Washington Dep't of Rev.*, 483 U.S. \_\_\_, 97 L.Ed.2d 199, 107 S.Ct. 2810 (1987) (*National Can*). F.I.D.
- [2] **RCW 82.04.440: B&O -- CREDITS -- MULTIPLE ACTIVITIES.** For periods beginning on or after June 23, 1987, taxpayers who are engaged in multiple business activities are entitled to take credits for similar taxes paid. F.I.D.
- [3] **RCW 82.32.060: B&O -- REFUNDS -- SELF HELP -- PENALTY -- EVASION.** There is no statutory authority for self help refunds. Where a taxpayer wilfully withholds any properly due excise taxes (such as B&O taxes or collected retail sales taxes) under an unverified claim that the taxpayer is entitled to a refund, without first having followed the Legislature's prescribed procedure for refunds, then the evasion penalty shall apply. F.I.D.

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.

#### FACTS:

Based on an examination of your Combined Excise Tax Returns, the Department of Revenue issued a number of Notices of Balance Due. These Notices pertain to the matter of business and occupation (B&O) tax liability as affected by the recent court decisions in Tyler Pipe Industries, Inc. v. Washington Department of Revenue (Tyler Pipe) and National Can Corporation, et al. v. Washington Department of Revenue (National Can), and as further affected by action taken by the Washington legislature in August 1987.

You have petitioned for correction of these Notices. In some cases these Notices reflect B&O taxes which have not been paid. In other cases Notices may have been issued as the result of purported payment of B&O taxes, under protest, by claiming credit for refunds asserted to be due by reasons of the decisions in Tyler Pipe or National Can. A summary of the Notices covered by this Final Determination is set forth in Appendix A.

#### DISCUSSION:

[1] In Tyler Pipe Industries, Inc. v. Washington Department of Revenue, 483 U.S. \_\_\_\_, 97 L.Ed.2d 199, 107 S.Ct. 2810 (1987) the U. S. Supreme Court invalidated the multiple activities exemption, RCW 82.04.440, and remanded the case to the Washington Supreme Court to decide the issue of remedy. We have held your petition in suspended status pending the decision of the Washington Supreme Court.

On January 28, 1988, the Washington Supreme Court issued its opinion in National Can, Docket No. 51910-2 and Tyler Pipe, Docket No. 51110-1. The Court ruled that the U. S. Supreme Court's decision in Tyler Pipe should be applied prospectively only from the date the opinion was issued, June 23, 1987. Thus, taxpayers are properly subject to Washington's B&O tax for periods prior to this date.

In light of the Washington Supreme Court's opinion, we see no purpose in holding a hearing before an Administrative Law Judge or Director and we are issuing this Determination as the final action of the Department.

The Department of Revenue has had to respond to many erroneously filed tax returns by similarly situated taxpayers. In that regard, the Department has issued Notices of Balance Due which include tax reporting periods both before and after June 23, 1987.

In your case, with regard to tax reporting periods prior to June 23, 1987 your petition is denied. See Appendix A. Under the Washington Supreme Court's January 28, 1988 decisions in National Can and Tyler Pipe, you are properly subject to the tax in question prior to that date.

[2] With respect to tax reporting periods after June 23, 1987, your petition is denied. See Appendix A. On August 10, 1987, the Washington legislature enacted laws of 1987, 2nd Ex. Sess., ch. 3. This statute provides for credits to cure the defect in the multiple activities exemption, RCW 82.04.440, identified by the U. S. Supreme Court in Tyler Pipe. As a result of this credit you are properly subject to Washington's B&O tax for reporting periods after June 23, 1987.

[3] The Notices of Balance Due summarized in Appendix A include a five percent (5%) penalty for failure to make payment. If the tax remains unpaid by the due date specified in this Final Determination, a further five percent (5%) penalty will be assessed as required by RCW 82.32.090. In addition, if the tax remains unpaid by the specified due date the Department's auditors will assess the fifty percent (50%) evasion penalty authorized in RCW 82.32.050, because we believe your continued failure to comply with the tax laws of this state is evidence of your intention to evade the taxes properly due.

For some reporting periods, you have failed to remit any tax at all to the state.

You have explained your reasons in a statement similar to the one as follows:

We make that payment by applying part of the credit to which [the taxpayer] is entitled for B&O taxes paid for past periods in excess of those properly due, per the United States Supreme Court's decision in [Tyler Pipe]. Those excessive taxes, to the extent not barred by the statute of limitations totaled [\$\_\_\_\_\_] plus interest. Of that amount, [the taxpayer] hereby applies [\$\_\_\_\_\_] in payment of the taxes reported on this return.

The U. S. Supreme Court did not order refunds in Tyler Pipe, and we find no authority in Washington law for offsetting your current taxes or the sales taxes you have collected with refunds you hope to receive but are not yet entitled to take. This is particularly true, since the Washington Supreme Court ruled in National Can and Tyler Pipe that the State was not required to pay refunds prior to June 23, 1987.

Further, we believe that the unauthorized taking of refunds by claiming credit against current sales tax remittance obligations, where that has occurred, is particularly egregious. RCW 82.08.050 provides that such tax is held in trust by the seller until paid to the Department. One who converts such tax to his own use may be subject to both criminal and civil penalties. Such "self help refunds", whether claimed against B&O or sales tax obligations, are totally unacceptable. If the tax remains unpaid by the due date specified in this Final Determination, the Department's auditors, as earlier noted, will assess the fifty percent (50%) evasion penalty authorized in RCW 82.32.050.

Accordingly, your petition is hereby denied and the Department will entertain no further appeals on this issue. For periods after June 23, 1987 you may be entitled to credits under Laws 1987, 2nd Ex. Sess., ch. 3. WAC 458-20-19301 contains general instruction with respect to the application of these credits.

#### DECISION AND DISPOSITION:

The total amount of the Notices of Balance Due summarized on Appendix A, which already includes the 5% penalty provided by RCW 82.32.090, is due on March 21, 1988. To avoid an increase of the penalty to ten percent (10%) and the imposition of the fifty percent (50%) evasion penalty, your payment must reach the Department on or before this new due date. After that date the account will be referred to the field for collection.

DATED this 19th day of February 1988.

STATE OF WASHINGTON DEPARTMENT OF REVENUE

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William R. Wilkerson, Director  
by Garry G. Fujita, Assistant Director

## Interpretation and Appeals Division