

Cite as 5 WTD 225 (1988)

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

In the Matter of the Petition)	<u>D</u> <u>E</u> <u>T</u> <u>E</u> <u>R</u> <u>M</u> <u>I</u> <u>N</u> <u>A</u> <u>T</u> <u>I</u> <u>O</u>
<u>N</u>	
for Refund and)	
Correction of Notices of Balance Due of)	No. 88-138
)	
)	Registration No. . . .
. . .)	Petition for Refund and
)	Notice of Balance Due
dated	
)	August 28, 1987

[1] **RULE 19301:** MULTIPLE ACTIVITIES CREDIT - OUT-OF-STATE MANUFACTURING - IN-STATE SALES. Credit amount claimed must be based on manufacturing gross receipts taxes paid in another jurisdiction on those products actually sold in Washington. The amount of the credit shall not exceed the Washington B&O tax liability with respect to the sale of those products, and the credit cannot be applied against the use tax due.

[2] **RULE 228:** RCW 82.32.090 -- PENALTIES -- LATE PAYMENT -- INADVERTENCE. If a taxpayer fails to pay taxes by the due date, there shall be assessed a penalty, unless the delay was caused by circumstance beyond the taxpayer's control. Nonpayment of taxes pending the outcome of the National Can litigation or a misapplication of the MATC is not such a circumstance.

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:

The taxpayer protests the assessment of late payment penalties.

FACTS AND ISSUES:

Burroughs, A.L.J.-- The taxpayer at issue was assessed a 5% penalty in a Notice of Balance Due for late payment of its June 1987 tax return. Payment of the tax amount has been received, but the taxpayer has not paid the penalty amount of \$

On June 23, 1987, the U.S. Supreme Court in Tyler Pipe Industries, Inc. v. Washington Department of Revenue, 483 U.S. ___, 97 L.Ed.2d 199, 107 S.Ct. 2810 (1987), invalidated the multiple activities exemption, RCW 82.04.440, and remanded the case to the Washington Supreme Court to decide the issue of remedy. The taxpayer initially withheld payment of its taxes pursuant to its determination that they would not ultimately be due and owing and pursuant to what it perceived were Departmental instructions in a Notice to Taxpayers distributed in July 1987. The tax amount was ultimately paid on November 30, 1987. The five percent penalty amount, however, was not paid and is the subject of this determination.

On January 28, 1988, the Washington Supreme Court issued its opinion in National Can, 109 Wn.2d 878 and Tyler Pipe, 109 Wn.2d 878. 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. Thus, the taxpayer was properly subject to Washington's B&O tax for periods prior to June 23, 1987.

With respect to tax reporting periods after June 23, 1987, taxes were also lawfully due. 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, the taxpayer was also properly subject to Washington's B&O tax for reporting periods after June 23, 1987.

The Department's well-publicized position throughout the above course of events was that all taxes subject to this litigation were to be timely paid, and that refunds would be later issued in the event the Department did not prevail. For its June and July 1987 returns, the taxpayer took the Multiple Activities Tax Credit (MATC) pursuant to an instruction in a July Notice

to Taxpayers. The credit taken for June was \$. . . against a current wholesaling and use tax liability of \$ The credit taken for July was \$. . . against a current wholesaling and use tax liability of \$ The taxpayer calculated a credit/refund of \$. . . at the end of July.

The taxpayer seeks a waiver of the penalty on its Notice of Balance Due.

DISCUSSION:

[1] The instructions in the July 87 Notice to Taxpayers, on which the taxpayer bases its claim for credit, read in pertinent part as follows:

The decision of the U.S. Supreme Court did not affect the wholesaling or retailing tax paid by out-of-state manufacturers selling their products in Washington. In other words, an out-of-state manufacturer selling products in Washington should continue to pay the "wholesaling" or "retailing" B&O tax.

Out-of-state manufacturers who believe they may be entitled to a credit against the Washington "wholesaling" or "retailing" B&O tax for manufacturing gross receipts taxes paid to another jurisdiction should attach a claim for the credit to the tax return.

Any such claims must be for taxes paid on manufacturing activities occurring in June, 1987, and thereafter. [Emphasis added.]

The taxpayer claims that the notice did not state that credits could not exceed the tax due. The Multiple Activities Tax Credit (MATC), which was enacted in Chapter 3, Washington Laws, 1987 2nd Ex. Sess., contains several provisos, three of which are in Section 2 as follows:

Persons taxable under RCW 82.04.270 [wholesalers] shall be allowed a credit against those taxes for any (a) manufacturing taxes paid with respect to the manufacturing of products so sold in this state, The amount of the credit shall not exceed the tax liability arising under this chapter with respect to the sale of those products. [Emphasis added.]

Accordingly, the credit is limited to gross receipts taxes paid pursuant to the manufacture of products actually sold in this state. Thus, if the taxpayer manufactures 100% of its product in another state which has a gross receipts tax, but sells only 10% of that product in Washington, the taxpayer may claim only 10% of those gross receipts taxes paid to the other state. This amount is further limited to the amount of tax owed in Washington on the taxpayer's wholesaling of that product. Finally, the credit in this case cannot be applied to use tax liability.

The matter of the correct amount of MATC for the months in question will be referred to the audit section, which will assist the taxpayer in making a correct determination.

[2] As far as the unpaid penalty amount, Washington's Revenue Act provides that if any tax due is not received by the Department of Revenue by the due date, there shall be assessed a penalty. RCW 82.32.090. A five percent penalty is mandated for returns which are received more than 30 days after the due date. As an administrative agency, the Department does not have discretion to change the law.

The only authority to cancel penalties or interest is found in RCW 82.32.105. That statute allows the Department to waive or cancel interest or penalties if the failure of a taxpayer to pay any tax on the due date was the result of circumstances beyond the control of the taxpayer. The statute also requires the Department to prescribe rules for the waiver or cancellation of interest and penalties.

The administrative rule which implements the above law is found in WAC 458-20-228 (Rule 228, . . .). Rule 228 lists the situations which are clearly stated as the only circumstances under which a cancellation of penalties and/or interest will be considered by the Department. None of the situations apply in the present case. The amount of penalty will, of course, be adjusted pursuant to the amount ultimately determined to be due.

DECISION AND DISPOSITION:

The taxpayer's petition for refund of taxes paid for June and July 1987 is denied.

The taxpayer's petition for correction of Notice of Balance Due dated August 28, 1987 is likewise denied, except that the

Audit Section will assist the taxpayer in determining the correct amount of MATC credit. An amended assessment, if applicable, will be issued, payment of which will be due on the due date thereon.

DATED this 22nd day of March 1988.