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

In The Matter of the Petition For Correction of Assessment of	)	D E T E R M I N A T I O N
	)	No. 89-188
. . .	)	Registration No. . . .
	)	. . . /Audit No. . . .
	)	

RULE 19301: MULTIPLE ACTIVITIES EXEMPTION -- INVALIDATION -- PROSPECTIVE APPLICATION -- POST-DECISION ASSESSMENTS. Assessments issued after the United States Supreme Court decision in Tyler Pipe on June 23, 1987, for taxes attributable to reporting periods prior to that time, are lawfully collectible by the state. Armco Steel v. Department of Treasury, Corporation Franchise Fee Division, 358 N.W.2d 839 (Mich. 1984); Snow's Mobile Homes, Inc. v. Morgan, 80 Wn.2d 283 (1972); State ex.rel. Matteson v. Luecke, 260 N.W. 206 (Minn 1935); Perk v. City of Euclid, 244 N.E.2d 475 (Ohio, 1969).

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: . . .
. . .

DATE OF CONFERENCE: December 7, 1988

NATURE OF ACTION:

Taxpayer petitions for correction of assessment of taxes for the period January 1, 1983 through June 30, 1987, on the grounds that the decision of the United States Supreme Court in Tyler Pipe Industries, Inc. v. Department of Revenue, 483 U.S. ____, 97 L.Ed 2d 199 (1987) rendered the taxes uncollectible.

FACTS AND ISSUES:

Hesselholt, A.L.J. -- Taxpayer is a diversified global manufacturing corporation based in . . . . It is a major producer of . . . . It manufactures products outside of Washington and sells those products to Washington from various locations in the United States and Canada.

In June 1987 the Department of Revenue contacted taxpayer and notified it that an auditor would be commencing an examination of the company's records. The records were examined by the Department for the period of January 1, 1983, through June 30, 1987. As a result of this audit, the Department issued a tax assessment in the amount of $ . . . in additional taxes and interest. Taxpayer protested the audit on July 13, 1988.

The auditor reported that a number of taxpayer's divisions did not report their sales to Washington customers on its consolidated Combined Excise Tax Returns. As a result, all of those sales were assessed business and occupation tax under the Wholesaling classification of the tax. Additionally, the auditor reclassified certain sales to retailing. Although taxpayer, in its initial petition to the Department, argued that there was insufficient nexus to tax it on the unreported sales, or alternatively, that the sales could be disassociated, no evidence has been presented to support this contention.

Primarily, taxpayer argues that because of Tyler Pipe, supra, and the decision of the Washington supreme court in National Can Corporation, et. al v. Department of Revenue, 109 Wn.2d 878 (1988), the state cannot collect unassessed and uncollected taxes for the periods prior to the decision.

DISCUSSION:

In Tyler Pipe, the U.S. Supreme Court invalidated the RCW 82.04.440 multiple activities exemption and remanded the case to the Washington Supreme Court to decide the issue of remedy.

On January 28, 1988, the Washington Supreme Court issued its opinion in National Can. The Court ruled that the U.S. Supreme Court's decision in Tyler Pipe should be applied prospectively only from the June 23, 1987 date the opinion was issued.

> It is difficult to understand how retroactive application would encourage free trade among the

> states since whatever chill was imposed on interstate trade in the past and the Legislature has enacted law to attempt to comport with the new commerce clause taxation laws announced in Tyler. . . . If this court afforded retroactive application and ordered full refunds, taxpayers engaged in interstate commerce would pay no portion of their share of the tax burden. The multiple activities exemption is now known to be unconstitutional because it imposes the risk of multiple burdens on interstate commerce, but this is not to say that all taxes imposed on a manufacturer or wholesaler under the B&O tax were unfair or interfered with free trade among states. The very risk of multiple burdens is now enough (since Tyler) to invalidate the Washington exemption. But, forcing the State to collect no taxes for the entire period of the statute of limitations would be more in the nature of a punitive award for misconstruing the constitutionality of the B&O tax. . . .

National Can, at 888,889.

> Whether the taxes had been collected or still remained to be collected is not relevant to the issue of retroactive application. The Ashland[1] court explained that it was irrelevant whether the disputed taxes had been paid or were simply assessed. . . Both taxes collected and those assessed and unpaid fall within the prospective application of Armco[2] and could be retained or collected by the State.

National Can, at 891.

Thus, while the court specifically addressed the question of the collectibility of taxes that were paid or assessed and uncollected, taxpayer argues that the court did not address the question of unassessed and uncollected taxes, such as those involved here. We think that the taxpayer is mistaken in this contention. The decision, as the above quotes make clear, held that the U.S. Supreme Court's decision applied

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[1]Ashland Oil, Inc. v. Rose, 350 S.E.2d 531 (1986), appeal dismissed, 95 L.Ed 2d 522 (1987).

[2]Armco Inc. v. Hardesty, 467 U.S. 638 (1984).

prospectively only. In the discussion regarding the equal protection concerns of the appellants in National Can, the court determined that pure prospective application was appropriate, and denied all claims for refunds before the date of the U.S. Supreme Court decision, and that it was not a violation of due process to deny refunds to taxpayers for taxes paid before the date of the decision, but to allow the holding to invalidate the tax after the date of the decision. National Can, at 895.

We believe that the Washington court's decision holds that taxes due before the time of the Tyler Pipe decision are due and payable to the state, and that the decision applies to taxes due only after June 23, 1987. There is no rational distinction 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.

Other states have also held that states cannot discriminate between taxpayers who have paid a tax when due and those who have not. For example, in Michigan, a situation arose, involving several court actions, in which some taxpayers had paid a higher franchise fee than was actually authorized under the statute. The Department of Treasury had recalculated fees for some corporations to a higher amount. Some corporations had paid the higher fee, others had been assessed the higher fee but not yet paid it, and some had not been assessed at all. In the first case, the court had held that the Department had had no authority to recalculate the fees. The legislature granted the Department authority to recalculate the fees, on a retroactive basis, and the Michigan Supreme Court subsequently determined that the legislation should be given prospective effect only. As a result, the Treasury Department cancelled the outstanding assessments, and made no further assessments for that period, but refused to grant refunds to those taxpayers who had paid the assessments and later sought refunds. The legislature next passed a bill that attempted to validate retroactively the Treasury Department's refusal to allow the refunds. In Armco Steel v. Department of Treasury, Corporation Franchise Fee Division, 358 N.W.2d 839 (Mich. 1984), the Michigan Supreme Court held that the legislature's attempt to retroactively validate the practice of denying refunds to those who had paid the tax denied those taxpayers equal protection of the law, since taxpayers who had refused to pay and those who had paid were one class of taxpayers, and the fact that one group had paid the deficiencies while the other had not was not a natural

distinguishing characteristic so as to refuse the refunds. The court stated as follows:

> . . . Although not determinative of our decision in this matter, case law in other jurisdictions has held it unconstitutional to benefit or prefer those who do not pay their taxes promptly over those who do. That, of course, is the precise effect of the fashion in which Act 392 has been applied to the plaintiffs in these cases.
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> While it is undisputed, therefore, that the Legislature can validate retroactively anything that it could have originally authorized, it is not empowered to validate the division's persistent discrimination between two groups of taxpayers who are in reality but one class.

(Citations omitted.)

Armco Steel, at 844. Washington's Supreme Court has also held that it is unconstitutional to allow those who comply with a tax law to be taxed, while those who did not will escape their tax obligation. Snow's Mobile Homes, Inc. v. Morgan, 80 Wn.2d 283 (1972). Other courts have come to the same conclusion. See, State ex.rel. Matteson v. Luecke, 260 N.W. 206 (Minn 1935); Perk v. City of Euclid, 244 N.E.2d 475 (Ohio, 1969). We find no difference in these situations.

Taxes are due within twenty-five days after the end of the reporting period. RCW 82.32.050. Taxpayer is on a monthly reporting period. Taxpayer's taxes were due and owing long before the amounts were assessed. The fact that taxpayer did not properly report its tax liability under the law as it existed at that time is no reason that it should gain a benefit that is not available to other taxpayers who properly reported their tax liabilities. Taxpayer has argued extensively that the Legislature can cut off a tax obligation at any time. With that statement we do not disagree. It has no relevance to taxpayer's situation. The legislature did not cut off taxpayer's liability. The court determined that the statute was invalid from June 23, 1987.

Taxpayer next argues that it should not be liable for tax for the period June 23, 1987, through June 30, 1987, because there was no valid law covering its tax liability in Washington at that time. On August 11, 1987, the Washington Legislature passed the new multiple activities tax credit. Chapter 3,

Laws of 1987, 2nd Ex. Sess. The law was made retroactive to June 23, 1987. It is the position of the Department of Revenue that the law applied retroactively to June 23, 1987. The decision of the Thurston County Superior Court holding that the retroactive aspect of the legislation was unconstitutional is under appeal.

DECISION AND DISPOSITION:

Taxpayer's petition is denied.

DATED this 31st day of March 1989.