Cite as Det. No. 00-099, 20 WTD 53 (2001)

BEFORE THE APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition For Refund of	)	D E T E R M I N A T I O N
	)	
	)	No. 00-099
	)	
. . .	)	Registration No. . . .
	)	Refund Request

[1] RULE 100; RCW 82.01.060(4), RCW 82.32.160, RCW 82.32.170: REVIEW OF DEPARTMENTAL ACTIONS – ASSESSMENTS AND REFUNDS – EXHAUSTION OF ADMINISTRATIVE REMEDIES. The review procedures authorized by RCW 82.01.060(4), 82.32.160, 82.32.170, and Rule 100 may be used by taxpayers to review tax assessments and refund requests. However, there is no duty to exhaust administrative remedies with regard to the Department's review processes before challenging the Department in a refund action under RCW 82.32.180.

[2] RCW 82.32.300: DEPARTMENT OF REVENUE -- ADMINISTRATION OF STATUTE LAW -- PRESUMED CONSTITUTIONALITY OF STATUTES. An administrative body does not have the authority to determine the constitutionality of the law it administers, but must presume the statute is constitutional.

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.

ADMINISTRATIVE LAW JUDGE: John M. Gray

NATURE OF ACTION:

A fruit packer seeks refunds of sales tax paid on labor to construct a project in 1994 and 1995 involving the storage and packing of fresh apples in an economically distressed area. As a result of the same construction project, it also seeks a refund, under ch. 82.62 RCW, of B&O tax.[1]

[1] Identifying details regarding the taxpayer and the assessment have been redacted pursuant to RCW 82.32.410.

ISSUES:

1. Is the taxpayer ineligible for benefits under chs. 82.60 and 82.62 RCW simply because it did not file its applications within the time required by the statutes?

2. Does H.B. 2295 apply to the taxpayer's applications?

BACKGROUND:

The taxpayer filed three petitions for tax refunds. The first petition, dated January 14, 1999, requests:

> that the application for refund of sales tax previously paid on labor to construct a qualified investment project in 1994 be held for later decision by the Department. Additionally, we request that the application be processed by the Department upon outcome of the issues under review by the State Court of Appeals.

The second petition, dated February 18, 1999, requests:

> that the application for B&O tax credit on new employment positions created in connection with a qualified investment project in 1994 be held for later decision by the Department. Additionally, we request that the application be processed by the Department upon outcome of the issues under review by the State Court of Appeals.

The third petition, dated February 11, 2000, requests:

> that the application for refund of sales tax previously paid to complete construction of a qualified investment project and on machinery and equipment purchases after July 1, 1995 be held for later decision by the Department. Additionally, we request that the application be processed by the Department upon resolution of legal questions regarding the retroactive applicability of House Bill 2295 to [the taxpayer's] application and the Department's denial of the application because it was not filed within the time required by statute.[2]

The facts are taken from an affidavit dated January 7, 2000, submitted by the taxpayer's president.

In 1994, the taxpayer undertook a construction project on its property located in . . .County, Washington. The project involved the construction of a building immediately adjacent to an existing building on its property (sharing a common wall). The project involved constructing a

[2] Concerning the third petition for refund, the taxpayer also said that it relied on the brief it submitted earlier supporting the other two petitions for refund.

new apple processing and packing line in the new building, demolishing an existing "dump" room used by the processing line in the existing building, and constructing a new "dump" room to be used by the line in the existing building and the new building ("the project"). The project expanded the taxpayer's existing apple processing operation. The taxpayer says the cost of the project exceeded 25% of the true and fair value of the plant complex prior to improvement.

The apple packing process begins with freshly picked apples that are delivered to the taxpayer's warehouse bins. Upon delivery to the taxpayer, the bins of apples are then placed in either short-term storage or long-term controlled atmosphere storage where, in both cases, the temperature is reduced to approximately 31.5 degrees Fahrenheit. The apples destined for long-term controlled atmosphere storage are treated with chemicals to prevent decay. Some of the apples are also treated with the chemical DPA to prevent scald, a disorder that left untreated will progress while the apples are in storage.

While the apples are in controlled atmosphere storage, the taxpayer reduces the oxygen levels in the atmosphere from normal levels to approximately 1-2% of the controlled atmosphere. The reduction of oxygen in the atmosphere causes a reduction in the enzymatic development of the apple.

When the apples are removed from either short-term or long-term storage, they are placed on packing lines. They are immersed in treated water to kill any bacteria and are subjected to a brushing process to remove deposits. The apples then go through a soaping process that rinses and cleans away field grime and residual pesticide, including field-applied pesticide. Some of the apples are treated with Mertect, which makes the apples resistant to bacteria. The apples are then dried and waxed. Waxing the apples delays respiration of the apples, and prolongs the apple's life.

After being waxed, the apples are then removed from the bins and sorted according to color and size. After the apples are sorted, they are rinsed with fresh water and then washed in a soapy solution with soft brushes. The apples are then dried and food grade wax is sometimes applied to the apples. The apples may be further sorted by color, size, and quality, and then are placed in containers for shipment. The washing, drying, waxing, sizing, and most sorting of the apples are accomplished through a connected series of mechanized equipment commonly known as a "packing line." Some of the sorting and most of the packing of the apples in containers is accomplished by hand labor. The packed apples are held in cold storage until they are shipped.

Using this process, the taxpayer extends the apples' lives from a month to approximately 11 months.

The taxpayer calculates the number of permanent full-time employee positions created as a result of the project to be approximately 40. The affidavit described the method of calculation. The affidavit also calculated the number of permanent full-time positions prior to October 1994 to be 82, and described the method of calculation.

The taxpayer acknowledges that it did not file an application with the Department before purchasing equipment and beginning construction, as required in RCW 82.60.030, or before hiring new employees in qualified positions, as required in RCW 82.62.020. Nonetheless, the taxpayer makes several arguments why it is entitled to tax relief. First, its failure to file applications under RCW 82.60.030 and 82.62.020 is excused because the law does not require the performance of futile tasks.[3] Second, HB 2295 does not apply retroactively to it because the taxpayer was entitled to apply for and receive tax refunds as of the date of its filings.

For the sake of convenience in this determination, the taxpayer's business activities will be referred to as "apple packing," although it is plain that considerably more than mere "packing" is involved. "Apple packing" includes the activities described in Valley Fruit v. Department of Rev., 92 Wn. App. 413, 963 P.2d 886 (Div. III, 1998):

> The apple packing process beings with whole, edible apples which are sized, graded, cleaned, waxed, packaged, and cooled. The apples are treated with fungicide, brushed clean of mineral deposits, rinsed, waxed and dried. The apples are then sorted by color and size and placed in a container where each apple receives a coded sticker. The apples are packed by hand into boxes and placed in CA storage until shipped. Depending on the shipping date, the apples may be placed in a controlled atmosphere where the oxygen is removed from the air to help preservation. The apples do not change form as a result of the packing process.

Valley Fruit, 92 Wn. App. at 415.

The taxpayer knew that the Department did not consider apple packing to be manufacturing. The Department's position was confirmed in Custom Apple Packers v. Department of Rev., BTA Docket No. 39498. The BTA upheld the Department's denial of an application for the deferral of taxes under ch. 82.60 RCW for the construction of a CA apple storage and apple packing facility in an economically distressed area.

The taxpayer here filed its refund request after the decision in Valley Fruit held that the business activities engaged in by the plaintiffs, Valley Fruit and Douglas Fruit Company, Inc. (Douglas Fruit), to be manufacturing and granted the plaintiffs' requests for sales and use tax exemptions. Prior to the appellate court decision, Douglas Fruit and Valley Fruit had applied for a distressed area sales and use tax deferral under ch. 82.60 RCW in 1994. The Department of Revenue's

[3] The taxpayer submitted two additional affidavits to support its argument why it should be excused from the requirement to file applications with the Department before taking any of the actions for which tax relief is allowed in chs. 82.60 and 82.62 RCW. The two affidavits are dated January 14, 2000. One is signed by the taxpayer's president and the other by the taxpayer's CPA. Briefly, the CPA said that the Department's position on apple packing not constituting manufacturing was so well known in the Yakima area that the accounting firm did not notify its apple packing clients of the existence of the programs available under chs. 82.60 and 82.62 RCW. The taxpayer's president said that it was not notified earlier by the accounting firm because the latter "was led to believe . . . that filing the applications would have been futile" and "that the Department would have denied the applications."

Appeals Division and, subsequently, the Board of Tax Appeals (BTA), denied their petitions, holding the fruit companies' business activities, apple packing, were not manufacturing. The two fruit companies appealed to Superior Court, one in Franklin County, the other in Yakima County, both of which reversed the BTA. The Department appealed to the Court of Appeals, which consolidated the two appeals. The Court of Appeals described the fruit companies' business activities and held:

> The fruit companies start with whole, edible apples which are treated with fungicide and brushed clean of mineral deposits. They are then rinsed, waxed, and dried. After they are sorted, the apples are stored in a controlled atmosphere to aid preservation. Although not included in the BTA's findings of fact, the uncontroverted evidence before it indicated the apples have a longer life as a result of this process. Using this process, the fruit companies are able to keep the apples 11 months. Without the processing, the apples would decay within a month. This undisputed testimony indicates the processing significantly changes the apples into a more useful product. Application of the facts presented to the BTA to the law defining manufacturing indicates these activities should be construed as manufacturing.

Valley Fruit, 92 Wn. App. at 419. The Court of Appeals issued its decision on July 28, 1998. The State Supreme Court denied the Department's petition for review. Valley Fruit v. Department of Rev., 137 Wn.2d 1017, 978 P.2d 1098 (1999). Thus, at that time, apple packing constituted manufacturing.

The Department and the legislature had two specific concerns with the Valley Fruit decision. First, in determining that apple packing constituted manufacturing, the implication was that apple packers would be required to pay B&O tax at the manufacturing rate, conflicting with an express exemption from the B&O tax for apple packers.[4] The Director of the Department of Revenue summarized the unintended consequences of the Valley Fruit decision in a May 5, 1999 letter to seven agricultural business associations:

> However, there are some adverse tax consequences in this situation and these consequences fall upon people who may not be aware that they are affected. In most cases the grower retains ownership of the agricultural product being packed. Since the packers in the above referenced case were successful in their legal argument that their apple handling activities qualify as a manufacturing process, a domino effect occurs. By law, the person who owns a product being manufactured is a manufacturer and the processor is considered a processor for hire. The ultimate result is that the grower is no longer eligible for the B&O exemption for farmers, because the agricultural product is being used as an ingredient in a manufacturing process. The packers are no longer eligible for their B&O exemption because they are packing for growers who are no

[4] RCW 82.04.4287 provides: "In computing tax there may be deducted from the measure of tax amounts derived by any person as compensation for the receiving, washing, sorting, and packing of fresh perishable horticultural products and the material and supplies used therein when performed for the person exempted in RCW 82.04.330, either as agent or as independent contractor."

> longer exempt farmers under RCW 82.04.330. Both the grower and the packer will owe B&O tax, the grower on every apple sold, either inside or outside the state. The packer will be taxable on the payment it receives for the packing activity. To make matters worse, it is also now unclear whether the grower is entitled to purchase seedlings, fertilizer, or spray materials without paying sales or possibly use tax. You should at least be aware that farmers statewide will soon be liable for millions of dollars in unanticipated taxes.

The second concern was the substance of the Valley Fruit decision itself. The Department's position has long been that apple packing is not manufacturing and that Douglas Fruit and Valley Fruit, as well as the taxpayer in this appeal, do not qualify for the tax deferral program in ch. 82.60 RCW.[5]

The Department decided to address these concerns in the 1999 regular legislative session. SB 6085 was an attempt to legislatively reverse the Valley Fruit decision, but the bill did not survive, and the regular session ended. In 1999, there was a Special Session of the legislature, and during the First Special Session the legislature approved HB 2295, which was substantially similar to the original SB 6085 of the regular legislative session. The Governor signed HB 2295 on June 7, 1999 and the bill was filed with the Secretary of State the same day.

HB 2295 affects the issues presented in this appeal for two reasons. First, HB 2295 amended the definition of manufacturing[6] to exclude apple packing:

> "To manufacture" shall not include: Conditioning of seed for use in planting; cubing hay or alfalfa; activities which consist of cutting, grading, or ice glazing seafood which has been cooked, frozen, or canned outside this state; the growing, harvesting, or producing of agricultural products; or packing of agricultural products, including sorting, washing, rinsing, grading, waxing, treating with fungicide, packaging, chilling, or placing in controlled atmospheric storage. (Emphasis supplied.)

In addition to amending the definition of manufacturing, HB 2295 also amended the definition of "manufacturing" in RCW 82.60.020 and RCW 82.62.010, to make clear that both chapters excluded "apple packing" from their scope.

Second, HB 2295 was expressly retroactive: "This act is intended to clarify that this is the intent of the legislature both retroactively and prospectively." HB 2295 contained an emergency clause and took effect immediately upon filing on June 7, 1999. Const. art. 2, § 1 (amend. 72).

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[5] The Department has acknowledged that "Yakima County has continuously qualified as an employment distressed county for the distressed area sales tax deferral program since 1985. Yakima County has also qualified for the new employee credit program since it was created in 1986." Letter of November 17, 1999, from . . ., Department of Revenue, Special Programs Division, Miscellaneous Tax Specialist, to another fruit packing company.

[6] RCW 82.04.120.

ANALYSIS:

1. Is the taxpayer ineligible for benefits under chs. 82.60 and 82.62 RCW because it did not file its applications within the time required by the statutes?

The heart of the taxpayer's argument on this first issue is that the law does not require a person to perform useless acts: "Since the Department would have denied the applications, what possible benefit would have arisen from filing the applications?" The taxpayer argues that in Valley Fruit, the taxpayers proceeded with their construction projects and, notwithstanding the fact that the Department never issued certificates, the Court of Appeals held that the taxpayers were entitled to a refund. However, both Valley Fruit and Douglas Fruit complied with the filing requirement in RCW 82.60.030. Valley Fruit, 92 Wn. App. at 415. (Valley Fruit involved applications under RCW 82.60.030 only; the case did not involve applications under RCW 82.62.020.)

The taxpayer cites several cases supporting its argument that the law does not require a person to perform useless acts. "A fundamental rule in American jurisprudence is that the law requires no one to do a thing vain and fruitless." State ex rel. Clark v. Hogan, 49 Wn.2d 457, 461, 303 P.2d 290 (1956). "It is hornbook law that the law does not require a useless act." Franklin County v. Sellers, 97 Wn.2d 317, 334, 646 P.2d 113 (1982). The taxpayer also analogizes to "knock and wait" cases, in which the Courts have made similar pronouncements regarding "futility."[7]

First, it is useful to remember that this issue arises in the context of an exemption from taxes. As stated in Budget Rent-A-Car, Inc. v. Department of Rev., 81 Wn.2d 171, 174-75, 500 P.2d 764 (1972):

> Exemptions to the tax law must be narrowly construed. Taxation is the rule and exemption is the exception. Anyone claiming a benefit or deduction from a taxable category has the burden of showing that he qualifies for it. Exemptions to the tax laws must be narrowly construed.

In determining whether an exemption is available to a taxpayer, we must consider that exemptions to taxing statutes are strictly construed in favor of the application of the tax. Yakima Fruit Growers Association v. Henneford, 187 Wn. 252, 60 P.2d 62 (1936); Miethke v. Pierce County, 173 Wn. 381, 23 P.2d 405 (1933*);* Boeing Aircraft Company v. Reconstruction Finance Corporation, 25 Wn.2d 652, 171 P.2d 838 (1946). It is required that any claim of exemption be studied with care before depriving the state of revenue. Alaska Steamship Company v. State, 31 Wn.2d 328, 196 P.2d 1001 (1948). Only where an exemption is clearly required by law should

[7] State v. Schimpf, 82 Wn.App. 61, 914 P.2d 1206 (1996); State v. Shelly, 58 Wn. App. 908, 795 P.2d 187 (1990); State v. Campbell, 15 Wn. App. 98, 547 P.2d 295 (1976); Seattle v. Sage, 11 Wn. App. 481, 523 P.2d 942 (1974) (alcohol breath test).

an individual be exempt from tax. North Pacific Coast Freight Bureau v. State, 12 Wn.2d 563, 122 P.2d 467 (1942).

RCW 82.60.030 and 82.62.020 authorize the deferral of sales and use tax and the granting of B&O tax credits, respectively. The deferral of tax and the authorization of tax credits are tax benefits conferred by statute. They are analogous to tax exemptions and deductions because all confer benefits on the taxpayer. We conclude that the rules of construing the applicability of tax exemptions apply to tax deferrals and tax credits. "Anyone claiming a benefit or deduction from a taxable category has the burden of showing that he qualifies for it." Group Health Coop. of Puget Sound, Inc. v. State Tax Comm'n, 72 Wn.2d 422, 433 P.2d 201 (1967); Budget Rent-A-Car Of Washington-Oregon, Inc. v. Department of Rev., 81 Wn.2d 171, 500 P.2d 764 (1972). As stated in Group Health:

> [W]e pause to observe that we attach no particular significance to the characterization of the statutory tax exclusions as "deductions" rather than "exemptions" insofar as the rules of statutory construction applicable here be concerned. Both a tax "exemption," which does not amount to total immunity, and a "deduction" presuppose a taxable status and must be claimed by the taxpayer if he is to benefit from either. In connection with each, the burden of showing qualification for the tax benefit afforded likewise rests with the taxpayer.

Group Health Coop., 72 Wn.2d at 429.

One of the elements of both RCW 82.60.030 and 82.62.020 is the requirement to file an application for deferral of taxes (RCW 82.60.030) or for tax credits (RCW 82.62.020) before beginning construction, buying equipment or machinery, or "actual hiring of qualified employment positions." Both statutes require that application "must be made" before the other construction, acquisition, or hiring is done, and the use of the word "must" has legal consequences:

> The court must give words in a statute their plain and ordinary meaning unless a contrary intent is evidenced in the statute. In re Estate of Little, 106 Wn.2d 269, 283, 721 P.2d 950 (1986). It is well settled that the word "shall" in a statute is presumptively imperative and operates to create a duty. Crown Cascade, Inc. v. O'Neal, 100 Wn.2d 256, 261, 668 P.2d 585 (1983), State v. Q.D., 102 Wn.2d 19, 29, 685 P.2d 557 (1984) (citing State v. Bryan, 93 Wn.2d 177, 183, 606 P.2d 1228 (1980). The word "shall" in a statute thus imposes a mandatory requirement unless a contrary legislative intent is apparent.

Bryan, 93 Wn.2d at 183 (quoting State Liquor Control Bd. v. State Personnel Bd., 88 Wn.2d 368, 377, 561 P.2d 195 (1977)).

There is nothing in RCW 82.60.030 or 82.62.020 that suggests the legislature intended the filing requirement to be permissive. It is plain from the statutory language that in order to avail oneself of the tax benefits in either statute, a taxpayer must first file the application with the Department.

Second, Franklin County Sheriff's Office v. Sellers, 97 Wn.2d 317, 646 P.2d 113 (1982), does not support the taxpayer's argument. In Sellers, a job applicant filed a job discrimination claim with the Washington State Human Rights Commission. One of the defenses argued by the Sheriff's Office was that Sellers never actually applied for the job. The quotation by the taxpayer from Sellers is accurate, but the Supreme Court's statement about "the law not [requiring] a useless act" is not as broad as it first appears. The Court wrote:

> Another assertion made by the County is that Sellers' claim is fatally deficient in that she did not make formal application for the job. We disagree. It is hornbook law that the law does not require a useless act. The evidence is not disputed that Sellers called and was told that only men were being considered for the job. The Sheriff himself confirmed this by letter to the Human Rights Commission shortly thereafter. The Sheriff testified that although he preferred a man he might have hired Sellers if no equally qualified man was available. At the time of the incident at issue, Sellers had a bachelor's degree in sociology and psychology and was close to completing a master's program in guidance and counseling. She had many years of teaching and counseling experience, including work with migrant workers in the Pasco area and some teaching experience with work release inmates. In fact, the Sheriff testified that he had not expected to attract anyone of Sellers' qualifications to apply for the position.
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> McDonnell Douglas Corp. v. Green, 411 U.S. 792, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973) sets out the four requirements of a prima facie case of discrimination: (1) plaintiff is a member of a suspect, or protected class, (2) plaintiff applied and was qualified for a job for which the employer was seeking applicants, (3) that despite plaintiff's qualifications s/he was rejected, (4) that after rejecting plaintiff, the job remained open and the employer continued to seek applicants with plaintiff's same basic qualifications.
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> As stated in WAC 162-30-010, the state law on discrimination will be interpreted by reference to the federal law when not in conflict. See Lindsay v. Seattle, 86 Wn.2d 698, 548 P.2d 320 (1976); Fahn v. Cowlitz Cy., 93 Wn.2d 368, 610 P.2d 857 (1980); Rose v. Hanna Mining Co., 94 Wn.2d 307, 616 P.2d 1229 (1980). Although we accept McDonnell Douglas as good law, technical compliance with element (2) would defeat the purpose of RCW 49.60, which is to be liberally construed to effectuate its purpose to prohibit unlawful discrimination. " [W] here an employer's acts deter [plaintiff] from applying, strict adherence to the 'application' requirement is not mandated." Iowa Civil Rights Comm'n v. Woodbury Cy. Comm'ty Action Agency, 304 N.W.2d 443, 451 (Iowa Ct. App. 1981), citing State Comm'n for Human Rights v. Yellow Cab, 611 P.2d 487, at 491 (Alaska 1980). See also Arnett v. Seattle Gen. Hosp., 65 Wn.2d 22, 395 P.2d 503 (1964).

Sellers, 97 Wn.2d at 334-35. Different policies lead to different results in Sellers and the taxpayer's tax case. The United States and Washington prohibit unlawful discrimination. To achieve this goal, courts liberally construe the statutes prohibiting unlawful discrimination and providing relief. The goal of prohibiting unlawful discrimination and providing a remedy by

interpreting the state law on discrimination "liberally" was plainly part of the Court's opinion when it wrote "[i]t is hornbook law that the law does not require a useless act." In the area of tax benefits, a different policy applies. The courts have ruled that tax exemptions, deductions, and other benefits, are to be "narrowly construed." That narrow construction requires that a taxpayer prove every element of tax benefit statute before the taxpayer is entitled to the benefits of the statute. As noted above, RCW 82.60.030 and 82.62.020 require taxpayers to file applications with the Department before construction, acquisition of equipment, or actual hiring of qualified employment positions. The taxpayer failed to satisfy the statutory filing requirement.

Third, the taxpayer's analogies to exceptions to the "knock and wait" rule fail for the same reasons as stated above. Different policies exist in a criminal case from those in a tax case. State v. Schimpf, 82 Wn. App. 61, 914 P.2d 1206 (1996), cited by the taxpayer, is illustrative. While one deputy sheriff approached the front door to arrest the defendant, another deputy sheriff walked around to the back of the house and peered over a fence into a backyard and saw contraband but no people. Seeing no one in the backyard, the deputy sheriff went through the gate into the backyard without announcing his presence, as is otherwise required by RCW 10.31.040. The Court of Appeals wrote:

> The purposes of the rule and the statute are (1) to reduce the potential for violence in an unannounced entry by police; (2) to prevent unnecessary damage to property; and (3) to protect occupants' privacy. [citations omitted.] The remedy for violation of the rule or the statute is suppression of the evidence.

In Schimpf, as well as the other cases cited by taxpayer, the courts found no need to require a deputy to announce the deputy's presence before entering because it would not have furthered the policies of the statute. The Court in Schimpf wrote, as quoted by the taxpayer in its brief, "the absence of any person in Mr. Schimpf's backyard, which Deputy Werner could confirm from his vantage point at the gate, would have made an announcement at that point an 'empty gesture.'" Schimpf, 82 Wn. App. at 65. However, the Court went on to say why it would be an empty gesture:

> A knock and announcement at the gate in these circumstances would serve none of the purposes of the rule and statute. Because no one was present in the backyard, there was little risk of violence. The unlocked gate permitted the deputy to enter the area without damage to property. And the deputy was able to look easily into the yard over the relatively low gate and fence, suggesting there were no significant, legitimate privacy interests involved.

Schimpf, 82 Wn. App. at 65. Similarly, the Court of Appeals wrote "[t]he 'useless gesture' exception applies when it is evident from the circumstances of the case that the authority and the purpose of the police are already known to those within the premises." State v. Shelley, 58 Wn. App. 908, 911, 795 P.2d 187 (1990). Also, in State v. Campbell, 15 Wn. App. 98, 101-102, 547 P.2d 295 (1976):

> Exigent and necessitous circumstances may justify noncompliance with the "knock and announce" requirement. Ker v. California, 374 U.S. 23, 10 L. Ed. 2d 726, 83 S. Ct. 1623 (1963); State v. Young, supra.
>
> It is recognized that strict compliance with the requirement will be excused when to knock and announce would be to perform a useless act, endanger the police or innocent persons within the dwelling, permit escape, or allow the destruction of evidence.

Finally, in Seattle v. Sage, 11 Wn. App. 481, 523 P.2d 942 (1974), the Court wrote, "[t]he legislature did not intend that an unconscious person, who under the specific wording of RCW 46.20.308 (2) may be tested, must first be advised of his rights to refuse the test. Such a proceeding would require a useless act on the part of the testing officer."

In none of these cases did the courts simply waive compliance with the knock and wait rule because the court thought it was unnecessary. All the cases involved some "exigent and necessitous" circumstances that made it reasonable under the circumstances to waive compliance with the rule.

There is nothing equivalent to "exigent and necessitous" circumstances in this tax appeal. As discussed above, the legislature chose to require that any taxpayer seeking the benefits afforded under RCW 82.60.030 or 82.62.020 must first file an application with the Department. The Department is an Executive Branch agency that administers excise tax laws enacted by the Legistative Branch. RCW 82.01.050; .060. The Department administered chs. 82.60 and 82.62 RCW by deciding that "apple packing" did not constitute manufacturing. There is no authority that allows a taxpayer to avoid compliance with a statutorily mandated duty by arguing that compliance would have been futile because "we would have lost." As noted above, both Valley Fruit and Douglas Fruit complied with the filing requirement in RCW 82.60.030. Valley Fruit, 92 Wn. App. at 415.

Finally, the taxpayer argues that Orion Corporation v. State, 103 Wn.2d 441, 693 P.2d 1369 (1985), supports its argument on the futility issue. Orion Corporation had purchased extensive amounts of land for development, but found its plans thwarted by several state and county legislative enactments. The opinion said "Orion's efforts at finding alternative uses for its land proved fruitless." Orion, 103 Wn.2d at 449. "Despite the state development and advertising of the sanctuary, Orion continued to negotiate with the State over selling its land but the parties were unable to agree on a price. Finally, Orion instituted the present suit." Orion, 103 Wn.2d at 454. Among other defenses, the defendants argued that Orion failed to exhaust its administrative remedies before filing suit. The Court observed, at the outset:

> As the cases make clear there is a strong bias toward requiring exhaustion before resort to the courts. This court recently noted that the policies underlying the exhaustion doctrine are to (1) insure against premature interruption of the administrative process, (2) allow the agency to develop the necessary factual background on which to base a decision, (3) allow the exercise of agency expertise, (4) provide a more efficient process and allow the

> agency to correct its own mistake, and (5) insure that individuals are not encouraged to ignore administrative procedures by resort to the courts. South Hollywood Hills Citizens Ass'n v. King Cy., 101 Wn.2d 68, 73, 74, 677 P.2d 114 (1984).

Orion, 103 Wn.2d at 456. In making its decision, the Court noted that "resort to the administrative procedures would be futile and vain" (Orion, 103 Wn.2d at 457), that the "record reveals that the State has made a conscious policy choice to preserve Padilla Bay in its natural state" (Orion, 103 Wn.2d at 457), and that a "willingness to consider an application is irrelevant if there is no hope of success if one is submitted." Orion, 103 Wn.2d at 457. From Orion, the taxpayer argues that it was not required to file an application before beginning construction, as required in RCW 82.60.030, because the Department would never have approved its application; thus, it was futile.

We are unconvinced that the duty to exhaust administrative remedies applies in this situation, and consequently, we are unconvinced that the futility exception to the duty to exhaust administrative remedies applies in this situation. The filing requirements in RCW 82.60.030 and RCW 82.62.020 are elements that must be satisfied before certain tax benefits may be realized by any taxpayer. In that regard, they are like any other element for a tax credit, exemption, or deduction.

The doctrine does not apply here because there are no administrative remedies that must be exhausted before any taxpayer may seek relief in court. Any taxpayer, having paid the disputed tax, may sue for a refund in Thurston County Superior Court. RCW 82.32.180. Any taxpayer may petition the Department for a refund. RCW 82.32.170. However, no taxpayer is required to petition the Department for a refund under RCW 82.32.170 before seeking relief in court. The taxpayer here could, at any time, have filed a refund action under RCW 82.32.180. However, the judge in the refund action would be asking the same question: "why are you entitled to a refund when you admit you did not satisfy the application-filing requirement in RCW 82.60.030?"

The taxpayer acknowledges that it did not timely file its applications with the Department. The taxpayer has not met its burden of proof and the benefits under RCW 82.60.030 and 82.62.020 must be denied.

The taxpayer's petition is denied on the filing issue.

2. Does H.B. 2295 apply to the taxpayer's applications?

The taxpayer's alternative argument is that H.B. 2295 does not apply to it. HB 2295 is expressly retroactive: "This act is intended to clarify that this is the intent of the legislature both retroactively and prospectively." The legislature intended that its definition of manufacturing, that excluded "apple packing" from the definition, be applied retroactively. The heart of the taxpayer's argument is that clarifying amendments do not apply retroactively, even if expressly stated, if the clarification affects a judicial interpretation of a statute. The taxpayer cited

numerous cases supporting its argument. The taxpayer here does not appear to argue that HB 2295 does not apply to them because it interferes with fundamental rights.

Nonetheless, we must address the possibility of a constitutional argument implicit in the taxpayer's statutory arguments. Obviously, we cannot rule on facial challenges to statutes. "An administrative body does not have authority to determine the constitutionality of the law it administers; only the courts have that power." Bare v. Gorton, 84 Wn.2d 380, 383, 526 P.2d 379 (1974). Excepting facial challenges to a statute, the Department frequently determines whether a tax statute may be enforced constitutionally as to particular persons; e.g., whether nexus exists to support B&O or sales tax on business conducted outside of Washington or transactions occurring outside of Washington.

A taxpayer has a heavy burden proving the unconstitutionality of a statute:

> Statutes are presumed constitutional and a party challenging a statute has the burden of establishing its invalidity beyond a reasonable doubt, as well as rebutting the presumption that all legally necessary facts exist. Higher Educ. Facilities Auth. v. Gardner, 103 Wn.2d 838, 843, 699 P.2d 1240 (1985).

High Tide Seafoods v. State, 106 Wn.2d 695, 698, 725 P.2d 411 (1986).

However, an administrative agency lacks the power to determine the constitutionality of legislation. This issue must be left for an Article IV court to decide. As was noted in National Can Corp. v. Department of Rev., 109 Wash. 2d 878, 887; 749 P.2d 1286:

> Even if the director's opinion was that placed in question the constitutionality of the B & O tax, it was not within his power to stop collecting taxes under a statute which had been properly enacted by the Legislature. The Department of Revenue was collecting taxes under a statute that had been repeatedly upheld and also enjoyed the presumption of constitutionality. The party challenging the statute would have to prove its invalidity beyond a reasonable doubt. High Tide Seafoods v. State, 106 Wn.2d 695, 725 P.2d 411 (1986).

This issue is not simply one of the administration of a tax statute, a subject committed to the Department. Chapter 82.01 RCW. The question here is the retroactivity of a statute passed by the legislature and signed by the governor and whether that statute applies to the taxpayers. That is an issue that must be decided by a court of competent jurisdiction. We must assume HB 2295 is constitutional.

The petition is denied on the retroactivity issue.

We expressly make no findings whether the taxpayer qualifies for the tax benefits in either RCW 82.60.030 or 82.62.020 because it is unnecessary to do so, having decided the taxpayer is not eligible for the tax benefits under either statute for the reasons stated in this determination.

DECISION AND DISPOSITION:

The taxpayer's petitions are denied.

Dated this 6th day of June, 2000.