

Cite as Det. No. 00-007, 19 WTD 694 (2000)

BEFORE THE APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition For Correction of)	<u>D E T E R M I N A T I O N</u>
Assessment of)	
)	No. 00-007
)	
...)	Registration No. ...
)	FY. . . /Audit No. ...

[1] MISCELLANEOUS: B&O TAX – IMPOSITION OF TAXES – AUTHORITY -- WAIVER OF – UNFAIR AND INEQUITABLE. The Department of Revenue is without authority to waive taxes lawfully imposed solely because they may appear unfair or inequitable.

[2] RULE 231; RCW 82.04.270: B&O TAX - - INTERNAL DISTRIBUTIONS TAX -- LEGISLATIVE CHANGE -- AMENDMENT – PROSPECTIVE. The 1998 statutory amendment to RCW 82.04.270 that deletes the internal distributions tax applies prospectively.

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:

A comic book and sports memorabilia business protests the imposition of internal distributions business and occupation tax (B&O) on transfers of merchandise.¹

FACTS:

Okimoto, A.L.J. . . . (Taxpayer) owns and operates . . . retail stores selling comic books, sports memorabilia, and other collectibles in the . . . , Washington vicinity. Taxpayer's books and records were examined by the Audit Division (Audit) of the Department of Revenue (Department) for the period January 1, 1994 through June 30, 1997. The audit examination resulted in additional taxes and interest owing in the amount of \$. . . and Document No. FY. . . was issued in that amount on December 18, 1998. Taxpayer protested the entire assessment and it remains due.

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

Appeals Division

Schedule 6: Unreported Internal Distribution

In this schedule, Audit assessed internal distributions tax on distributions of inventory from Taxpayer's own Washington office/warehouse to its . . . retail stores located in Washington. Audit valued the transfers based on Taxpayer's purchases of inventory.

CONTENTIONS AND ARGUMENTS:

Taxpayer states that the internal distributions tax and WAC 458-20-231(Rule 231) were in effect from April 1, 1990 through July 1, 1998. In 1998, the Washington State Legislature passed Senate Bill 6270, Laws of 1998, ch. 329, §1 and amended RCW 82.04.270 to delete the internal distributions tax. Taxpayer asserts in its petition:

In effect, the tax that was established in 1990, in an attempt to treat any transfers from warehouses to retail stores the same (whether from wholesalers or the same business), was not being applied equitably. There was a double tax being assessed on the same item. One wholesale tax was being paid when the product transferred from the wholesaler to the business warehouse (when title also transferred), and another wholesale tax was being assessed when the business further transferred those same products to their retail stores (when no further title transfer took place). The large businesses in Washington discovered this double tax and changed their ways of doing business to avoid it. In effect, it was only the small business owner that was affected. We do not believe that this is what the original bill writers had intended when they wrote WAC 458-20-231.

Taxpayer further contends that the removal of the internal distributions tax by Senate Bill 6270 should be applied retroactively, since it was passed to correct an inequitable tax situation.

ISSUES:

- 1) May the Department waive lawfully imposed taxes on the basis that the tax was unfair and inequitably applied?
- 2) Should the Legislature's deletion of the internal distributions tax in 1998 be applied retroactively?

DISCUSSION:

RCW 82.04.270(2)² imposes a business and occupation tax for the privilege of distributing goods within this state. It states:

(2) The tax imposed by this section is levied and shall be collected from every person engaged in the business of distributing in this state articles of tangible personal property, owned by them from their own warehouse or other central location in this state to two or more of their own retail stores or outlets, where no change of title or ownership occurs, the intent hereof being to impose a tax equal to the wholesaler's tax upon persons performing functions essentially comparable to those of a wholesaler, but not actually making sales: PROVIDED, That the tax designated in this section may not be assessed twice to the same person for the same article. The amount of the tax as to such persons shall be computed by multiplying 0.484 percent of the value of the article so distributed as of the time of such distribution: PROVIDED, That persons engaged in the activities described in this subsection shall not be liable for the tax imposed if by proper invoice it can be shown that they have purchased such property from a wholesaler who has paid a business and occupation tax to the state upon the same articles. This proviso shall not apply to purchases from manufacturers as defined in RCW 82.04.110. The department of revenue shall prescribe uniform and equitable rules for the purpose of ascertaining such value, which value shall correspond as nearly as possible to the gross proceeds from sales at wholesale in this state of similar articles of like quality and character, and in similar quantities by other taxpayers: PROVIDED FURTHER, That delivery trucks or vans will not under the purposes of this section be considered to be retail stores or outlets.

This tax has actually been in existence since 1935 in one form or another. The original version of the statute was enacted for the purpose of levying a tax on retailers performing functions similar to wholesalers. Laws of 1935, ch.180 §4, p. 709. A version similar to the above-quoted RCW 82.04.270 was passed in 1959. That statute separately taxed wholesalers under subsection (1) and then levied a tax equal to the wholesaler's tax on qualifying distributors under subsection (2). Laws of 1959, 1st Ex. Sess., ch.5, §3, p.1666.

In 1990, however, the Washington State Supreme Court struck down the second proviso, (which excluded from the tax distributions of goods purchased from another wholesaler), as unconstitutional. The court found that the proviso treated wholesalers and distributors unequally and therefore violated the equal protection clause of the United States Constitution. Associated Grocers, Inc. v. State of Washington, 114 Wn. 2d 182; 787 P.2d 22 (1990).

² RCW 82.04.270 was amended in 1994. This version was in effect from 1993 through 1994. The second proviso in the statute was also voided by the Washington State Supreme Court in Associated Grocers, Inc. v. State of Washington, 114 Wn. 2d 182; 787 P.2d 22 (1990).

In response to this court action, the Washington State Legislature amended RCW 82.04.270 in 1994 to exclude proviso #2. WAC 458-20-231 (Rule 231) was then amended to reflect that statutory change.

The effect of voiding the second proviso leads to the inequitable result complained of by Taxpayer. It results in a wholesaling tax being paid by the supplier when the supplier sells and transfers title of the goods to Taxpayer, and a second internal distributions tax being paid by Taxpayer when Taxpayer internally transfers the goods from a central warehouse to its own retail stores. Although this may not have been the original intent of the bill writers, it is the statutorily mandated result of the law as modified by the courts. See. Associated Grocers, Inc. v. State of Washington, supra. This result was further ratified by the Legislature's subsequent amendment to RCW 82.04.270 in 1994. We are simply without authority to waive taxes lawfully imposed solely because they may appear unfair or inequitable.

Nor can we grant relief by applying Senate Bill 6270 retroactively, as Taxpayer suggests. As a general rule, courts presume that statutes operate prospectively unless there is some contrary legislative indication³. Agency Budget Corp. v. Washington Ins. Guar. Ass'n, 93 Wn. 2d 416, 610 P.2d 361 (1980). In this case Senate Bill 6270 provides a clear effective date of July 1, 1998. Therefore, we must deny Taxpayer's petition on this issue.

DECISION AND DISPOSITION:

Taxpayer's petition is denied.

Dated this 31st day of January, 2000.

³ Although there is a different presumption for repealing statutes, SB 6270 was an amendment to the existing statute that imposed B&O tax on wholesalers and distributors, not a bill that repealed the entire tax. Therefore, the above presumption applies.