Think You're Having A Bad Day?

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Consider this thought: for the last several decades, you have not been paying sales tax on food, because the state exempts food sales from the tax. Okay, that is not an earth shattering thought. However, imagine that the legislature has determined that exempting food from the sales tax is not good tax policy, that it is no longer affordable by the state, or that the products manufactured by food companies should bear the same tax burden as all other manufactured products. The reason why the change occurred does not really matter but now you know that you are liable for sales tax on food. Okay, now you're having a bad day. You do not like that result, but it is fair notice of your tax responsibilities into the future. You budget accordingly and go on with life.

But could your day get any worse? This is beyond our imagination, but what if the legislature not only eliminated your sales tax exemption on food for the future, but it also did so retroactively? You now owe sales tax on the food that you have been buying for the last four years! That's a really bad day. "What?" you stammer. "Impossible!" you proclaim. Can this be true in America?

You can settle down, because the sales tax exemption on food is safe for the time being, but the alarming truth is that this scenario may well happen to certain taxpayers in this state with regard to a deduction for bunker fuel sold to ocean-going vessel operators (and raising the risk that it could happen in other contexts as well).

For nearly 24 years, everyone, including the Department of Revenue, thought that the tax law granted oil refiners a tax deduction for bunker fuel sold to ocean-going vessel operators. In 2009, the legislature adopted, and the governor signed a retroactive "clarification," denying a taxpayer a refund of the tax imposed on the denied deduction that the Department of Revenue had allowed other taxpayers to enjoy.[1] Some representatives and senators unsuccessfully tried to limit the amendment to prospective application.[2] Not only was a particular taxpayer retroactively denied the deduction, but the amendment also created a tax liability that the other refiners did not think they had based on the previous 24 years of tax law.

The Washington Court of Appeals would not hear of this. It rejected the legislature's retroactive elimination of 24 years of the allowed deduction under the pretense of "clarification." See Tesoro Refining and Marketing Co. v. State, Dept. of Revenue, 159 Wash. App. 104, 246 P.3d 211 (2010).

The Department of Revenue appealed that decision to the Washington State Supreme Court, which accepted the petition for review. One of the two questions the Department of Revenue has asked the Court to answer is:

The 2009 Legislature's curative amendment of RCW 82.04.433 unambiguously limited the deduction to amounts otherwise taxed for engaging in the activity of selling bunker fuel in Washington. If the 2009 amendment changed the intended meaning of the 1985 statute, does retroactive application of the 2009 amendment as intended by the Legislature violate the Due Process Clause of the United States Constitution, where it precludes refund claims by Tesoro and other crude oil refinery owners for manufacturing B&O taxes they paid during any open tax periods before the Governor signed the 2009 amendment?

Department of Revenue's Petition for Review (Doc. No. 85556-1), page 1.

If the courts allow this, this scenario could happen to any tax preference … deductions, credits, exemptions and deferrals under the pretense that the legislative amendment is simply a "clarification" of past law.[3] Do you think you qualify for the high B&O tax credit? You might find out next year that a "clarification" has just disqualified you for the last four years. Do you think you qualify for any of the sales tax deferral programs? You might find out next year that a "clarification" has just disqualified you for the last four years. Ask yourself that question about any tax benefit that you receive, and the answer is that the Washington legislature could try retroactively to take away that benefit under the pretense of a "clarification."

If you think that it is a violation of due process to impose tax retroactively, then you should consider telling the Supreme Court why in an amicus curiae (friend of the court) brief. If you have any questions, please feel free to call us.

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[1]There is another interesting side note to this legislation, resulting in U.S. Oil suing the state for tortious conduct. In passing the 2009 legislation, the Office of Financial Management and the Department of Revenue prepared fiscal notes that showed that the amendment would not increase taxes. This fiscal note meant that the legislation could pass without having a 2/3 approval in each house, because taxes were not being raised. U.S. Oil alleged that the fiscal notes were knowingly untruthful because the Department of Revenue knew that refiners had been taking the tax deduction for the last two decades. Consequently, it argued that the intentional conduct led to U.S. Oil paying more taxes by causing the 2009 amendment to pass without the required 2/3

approval. The Court of Appeals rejected the claim because the 2/3 vote requirement could not be enforced by a taxpayer under the public duty doctrine. U.S. Oil Trading, LLC v. State, 159 Wash. App. 3578, 249 P.3d 630 (2011).
[2]6096 AMH ERIC H3472.1, 6096 AMS Bran Gorr 497, 6096 AMS HOBB s3030.1, 61st Leg., Reg. Sess. (Wash. 2009).
[3]Indeed, a variation of this problem has already happened in the 2010 SSB 6143 omnibus tax bill with respect to taxing certain business structures.