

ORDINANCE No. 115259

COUNCIL BILL No. 108142

*Law Department*

The City

AN ORDINANCE adding a new Section 5.44.320 to the Seattle Municipal Code to provide for possible tax refunds.

Honorable President:

Your Committee on Finance

to which was referred the within report that we have considered the

COMPTROLLER FILE No. \_\_\_\_\_

Introduced: AUG 1 2 1990	By: SIBONGA
Referred: AUG 1 3 1990	To: Finance, Budget and Management
Referred:	To:
Referred:	To:
Reported: AUG 2 0 1990	Second Reading: AUG 2 0 1990
Third Reading: AUG 2 3 1990	Signed: AUG 2 0 1990
Presented to Mayor: AUG 2 1 1990	Approved: AUG 2 1 1990
Returned to City Clerk: AUG 2 1 1990	Published:
Vetoed by Mayor:	Veto Published:
Passed over Veto:	Veto Sustained:

PASS

Vote

OK

Department

# The City of Seattle--Legislative Department

Date Reported  
and Adopted

## REPORT OF COMMITTEE

President:

Committee on Finance, Budget & Mgmt

was referred the within Council Bill No. 108142

that we have considered the same and respectfully recommend that the same:

PASS 3-0 8/15/90

Vote 6-0

\_\_\_\_\_  
Committee Chair

ORDINANCE 115259

AN ORDINANCE adding a new Section 5.44.320 to the Seattle Municipal Code to provide for possible tax refunds.

WHEREAS, in Tyler Pipe Industries, Inc. v. Washington State Department of Revenue, 483 U.S. 232, 107 S.Ct. 2810, 97 L.Ed.2d 119 (1987), decided June 23, 1987, the United States Supreme Court declared invalid the multiple activities exemption in Washington's business and occupation tax as discriminatory against interstate and/or foreign commerce with respect to interstate shipments subject to gross receipts taxes out-of-state; the Washington Supreme Court in National Can Corp. v. Department of Revenue, 109 Wn.2d 878, 749 P.2d 1286 (1988), ruled that relief should be prospective only, and in American National Can Corp. v. Department of Revenue, 114 Wn.2d 236, 787 P.2d 545 (1990), upheld the state's remedial legislation allowing a credit for gross receipts taxes paid elsewhere against the state business and occupation tax;

WHEREAS, the United States Supreme Court in McKesson Corp. v. Florida Division of Alcoholic Beverages and Tobacco, U.S. \_\_\_\_\_, L.Ed.2d \_\_\_\_\_, \_\_\_\_\_ Supr. Ct. \_\_\_\_\_, 58 USLW 4665 (1990), ruled that, when a state tax is found to be unconstitutionally discriminatory under the Commerce Clause of the U.S. Constitution, a state may limit its refund of back taxes to an amount sufficient to eliminate the discriminatory impact; RCW 82.04.440(4) provides that if the State of Washington is ordered to refund back taxes, relief during the earlier period shall be measured by the tax credit provided by its remedial legislation for later periods; and

WHEREAS, the City's business and occupation tax is modeled after the Washington State business and occupation tax, effective July 1, 1987, Ordinance 113611 provided a series of deductions codified as SMC § 5.44.050-5.44.058 to remedy the discrimination declared invalid in the State's National Can litigation; the City has a variety of cases pending that are seeking recovery of back taxes; and if retroactive refunds are found to be due, an ordinance section patterned after RCW 82.04.440(4) would be a valid measure of relief in light of the McKesson case; Now, Therefore,

BE IT ORDAINED BY THE CITY OF SEATTLE AS FOLLOWS:

Section 1. SMC Chapter 5.44 is amended by adding thereto a new Section 5.44.320, as follows:



(To be used for all Ordinances except Emergency.)

Section 4. This ordinance shall take effect and be in force thirty days from and after its passage and approval, if approved by the Mayor; otherwise it shall take effect at the time it shall become a law under the provisions of the city charter.

Passed by the City Council the 20th day of August, 1990, and signed by me in open session in authentication of its passage this 20th day of August, 1990. *[Signature]*  
President Pro Tem of the City Council.

Approved by me this 24th day of August, 1990. *[Signature]*  
Mayor.

Filed by me this 24th day of August, 1990.

Attest: *[Signature]*  
City Comptroller and City Clerk.

By *[Signature]*  
Deputy Clerk.

(SEAL)

Published \_\_\_\_\_

PUBLISH  DO NOT PUBLISH

CITY ATTORNEY \_\_\_\_\_

# City of Seattle

Executive Department-Office of Management and Budget

Andrew J. Lofton, Director  
Norman B. Rice, Mayor



July 27, 1990

The Honorable Mark Sidran  
City Attorney  
City of Seattle

Dear Mr. Sidran:

The Mayor is proposing to the City Council that the enclosed legislation be adopted.

REQUESTING  
DEPARTMENT            Law

SUBJECT:                An ordinance adding a new Section 5.44.320  
to the Seattle Municipal Code to provide for  
possible tax refunds.

Pursuant to the City Council's S.O.P. 100-014, the Executive Department is forwarding this request for legislation to your office for review and drafting.

After reviewing this request and any necessary redrafting of the enclosed legislation, return the legislation to OMB. Any specific questions regarding the legislation can be directed to Rod Brandon at 684-8080.

Sincerely,

Norman B. Rice  
Mayor

by

ANDREW J. LOFTON  
Budget Director

AL/rb/lw

Enclosure

cc: City Attorney

June 28, 1990

TO: FILE

FROM: Jorgen G. Bader, Assistant City Attorney

RE: Attached ordinance relating  
to possible tax refunds

The attached ordinance was prepared in response to two recent United States Supreme Court decisions decided June 4, 1990: American Trucking Associations, Inc. v. Smith, 58 U.S. Law Week 4704 (1990) and McKesson Corp. v. Florida Division of Alcoholic Beverages and Tobacco, 58 U.S. Law Week 4665 (1990). The two cases reawakened seven taxpayer lawsuits that had challenged the City's business and occupation tax as discriminatory of interstate commerce.

The ordinance reduces the risk of a refund of taxes accrued before July 1, 1987. The seven pending cases are based on Tyler Pipe Industries, Inc. v. Washington State Department of Revenue, 483 U.S. 232 (1987), a United States Supreme Court decision that ruled Washington's multiple activities exemption in the state business and occupation tax unconstitutional. On August 11, 1987, Washington amended RCW 82.04.440 and Seattle adopted SMC § 5.44.050-.058, effective July 1, 1987. This ordinance takes SMC § 5.44.050-.058 further by extending it backward as to pending cases. There are two primary reasons for doing so:

- (1) The ordinance formally covers the eight day gap between the date of the Tyler Pipe Industries decision, June 23, 1987, and the effective date of SMC § 5.44.050-.058 as to the eight litigants. The Director of Licenses and Consumer Affairs had allowed those taxpayers, who made a request citing Tyler Pipe Industries and provided documentation, to make the deductions allowed by SMC § 5.44.050-.058 for the eight day period. (Ordinance 113611 had used July 1, 1987 as the effective date to avoid the administrative burden of re-opening and re-filing second quarter tax returns.)
- (2) The ordinance provides a backstop in the event that the Tyler Pipe Industries decision is applied retroactively to the date of the decision in Armco, Inc. v. Hardesty, 467 U.S. 638 (1984), June 12, 1984. The Washington Supreme

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Court in National Can Corp. v. Department of Revenue, 109 Wn.2d 878, 749 P.2d 1286 (1986), ruled that the Tyler Pipe Industries decision applies as of June 23, 1987 and denied the litigants in the state cases tax refunds for the earlier period. In four City cases now on appeal, the Superior Court reached the same conclusion as to City taxes. Three cases are still pending in Superior Court.

In the five cases already tried, the taxpayers compared the City's stance on its business and occupation taxes before July 1, 1987 to that of a trapeze artist on a high wire. If the Tyler Pipe Industries decision applies retroactively, they argued, then all taxes collected must fall away since the City has no safety net like the State does for the prior period. In the lawsuits against the validity of the State's remedial legislation, the estimated relief through the state credit system was less than 2% of the gross state business and occupation taxes collected. Applying SMC 5.44.050-.058 would reduce the back taxes at stake in the pending taxpayer cases against the City by a very large ratio.

Since Seattle's tax is patterned after the state tax, decisions in the state tax cases are strong legal precedents as to City taxes. After its loss in the Tyler Pipe Industries case, the State Department of Revenue won two major victories: National Can Corp. v. Department of Revenue, 109 Wn.2d 878, 749 P.2d 1286 (1988) cert. denied 486 U.S. 1040, 108 S.Ct. 2030, 100 L.Ed.2d 615 (1989) denied the taxpayers refunds for taxes accrued before June 23, 1987; and American National Can Corp. v. Department of Revenue, 114 Wn.2d 236, 787 P.2d 545 (1990) upheld the State's remedial legislation. The taxpayer litigants are seeking review of the latter case in the United States Supreme Court.

The two U.S. Supreme Court decisions, announced June 4, 1990, involved refund of state taxes found to be unconstitutional as violative of the commerce clause of the U.S. Constitution. The McKesson Corp. case ruled invalid a Florida law that attempt to make a new tax retroactive in order to avoid granting taxpayers a refund for a tax found to be invalid as discriminatory against interstate commerce; the opinion states that Florida could enact legislation to match the amount of the refund to the discriminatory portion of the tax rather than refund the total amount of taxes paid. The McKesson decision is a precedent upholding the State's backstop legislation, RCW 82.04.440(4). The American Trucking Associations decision, by a 5 to 4 vote, denied refunds of certain trucking license fees accrued before the date of its decision declaring the fees

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unconstitutional; earlier decisions had upheld similar fees. The court delivered three opinions: a 4-member plurality, one concurring, and a 4-member dissent. The taxpayer litigants view the two U.S. Supreme Court decisions as indicative of a possible further movement by the U.S. Supreme Court in refining the restraints of the Commerce Clause upon state and local taxation.

JGB:bjw

[File.Mem]

**SEATTLE CITY ATTORNEY  
MARK H. SIDRAN**

CRIMINAL DIVISION  
710 SECOND AVENUE, SUITE 1414  
SEATTLE, WASHINGTON 98104  
(206) 684-7757 FAX: (206) 684-4648

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UTILITIES DIVISION  
1015 THIRD AVENUE, SUITE 902  
SEATTLE, WASHINGTON 98104  
(206) 684-3361

July 5, 1990

RECEIVED OMB

JUL - 5 1990

846317

Honorable Norman B. Rice, Mayor  
and  
Honorable Paul Kraabel, President ✓  
City Council  
The City of Seattle

Re: Ordinance relating to possible tax refunds

Dear Mayor Rice and Council President Kraabel:

We forward with this letter proposed legislation which, if passed, would minimize the fiscal impact on the City of recent United States and Washington Supreme Court cases holding certain aspects of taxes similar to our business and occupation tax unconstitutional under the interstate commerce clause of the U.S. Constitution. Without the proposed legislation, there is some risk of being ordered to pay tax refunds up to \$1,513,349 on the outside. Depending on the outcome of cases pending against the City (four cases in Court of Appeals, three cases in Superior Court), some refunds may have to be made, but the ultimate exposure can be reduced by passage of the proposed ordinance.

The proposed legislation applies a modified, constitutional form of the City tax retroactively and allows credits for unconstitutional taxes previously paid. Note, also, that the proposed ordinance grants some settlement authority to further minimize potential costs to the City.

In our view, it is appropriate to take precautions in the event of adverse court decisions and have a more protective, fall-back position in place for the 1990-1991 series of taxpayer cases. The proposed ordinance does just that and we strongly recommend its passage.

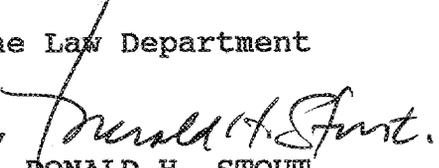
Honorable Norman B. Rice, Mayor  
Honorable Paul Kraabel, President  
City Council  
The City of Seattle  
July 5, 1990  
Page 2

We forward with this letter and the proposed legislation a more detailed explanation and extended analysis of this matter.

Very truly yours,

The Law Department

By

  
DONALD H. STOUT

Assistant City Attorney

DHS:bjw  
encl.

cc: Licenses and Consumer Affairs

[RICE-KRAABEL.LER]

TIME AND DATE STAMP

**SPONSORSHIP**

THE ATTACHED DOCUMENT IS SPONSORED FOR FILING WITH THE CITY COUNCIL BY THE MEMBER(S) OF THE CITY COUNCIL WHOSE SIGNATURE(S) ARE SHOWN BELOW:

*Salvador Litonga*

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**FOR CITY COUNCIL PRESIDENT USE ONLY**

COMMITTEE(S) REFERRED TO: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

\_\_\_\_\_  
PRESIDENT'S SIGNATURE

STATE OF WASHINGTON - KING COUNTY

29931  
City of Seattle

—ss.

No.

Affidavit of Publication

The undersigned, on oath states that he is an authorized representative of The Daily Journal of Commerce, a daily newspaper, which newspaper is a legal newspaper of general circulation and it is now and has been for more than six months prior to the date of publication hereinafter referred to, published in the English language continuously as a daily newspaper in Seattle, King County, Washington, and it is now and during all of said time was printed in an office maintained at the aforesaid place of publication of this newspaper. The Daily Journal of Commerce was on the 12th day of June, 1941, approved as a legal newspaper by the Superior Court of King County.

The notice in the exact form annexed, was published in regular issues of The Daily Journal of Commerce, which was regularly distributed to its subscribers during the below stated period. The annexed notice, a

ORD: 115259

was published on

09/06/90

The amount of the fee charged for the foregoing publication is the sum of \$ \_\_\_\_\_, which amount has been paid in full

*M. S. Kypston*  
Subscribed and sworn to before me on  
*Valerius J. Hall* SEP 06 1990

Notary Public for the State of Washington,  
residing in Seattle

# City of Seattle

ORDINANCE 118238

AN ORDINANCE adding a new Section 5.44.320 to the Seattle Municipal Code to provide for possible tax refunds.

WHEREAS, in Tyler Pipe Industries, Inc. v. Washington State Department of Revenue, 483 U.S. 312, 107 S.Ct. 2810, 97 L.Ed.2d 119 (1987), decided June 23, 1987, the United States Supreme Court declared invalid the multiple activities exemption in Washington's business and occupation tax as discriminatory against interstate and/or foreign commerce with respect to interstate shipments subject to gross receipts taxes out-of-state; the Washington Supreme Court in National Can Corp. v. Department of Revenue, 109 Wn.2d 878, 749 P.2d 1288 (1988), ruled that relief should be prospective only, and in American National Can Corp. v. Department of Revenue, 114 Wn.2d 316, 787 P.2d 545 (1990), upheld the state's remedial legislation allowing a credit for gross receipts taxes paid elsewhere against the state business and occupation tax;

WHEREAS, the United States Supreme Court in McKesson Corp. v. Florida Division of Alcoholic Beverages and Tobacco, U.S. \_\_\_\_\_, L.Ed.2d \_\_\_\_\_, Supr. Ct. 58 USLW 4665 (1990), ruled that, when a state tax is found to be unconstitutionally discriminatory under the Commerce Clause of the U.S. Constitution, a state may limit its refund of back taxes to an amount sufficient to eliminate the discriminatory impact; RCW 82.04.440(4) provides that if the State of Washington is ordered to refund back taxes, relief during the earlier period shall be measured by the tax credit provided by its remedial legislation for later periods; and

WHEREAS, the City's business and occupation tax is amended after the Washington State business and occupation tax, effective July 1, 1987, Ordinance 118111 provided a series of deductions codified as SMC 5.44.050-5.44.058 to remedy the discrimination declared invalid in the State's National Can litigation; the City has a variety of cases pending that are seeking recovery of back taxes; and if retroactive refunds are found to be due, an ordinance section patterned after RCW 82.04.440(4) would be a valid measure of relief in light of the McKesson case; Now, Therefore,

BE IT ORDAINED BY THE CITY OF SEATTLE AS FOLLOWS:

Section 1. SMC Chapter 5.44 is amended by adding thereto a new Section 5.44.320, as follows:

Section 5.44.320 Refund if Ordered under National Can Section.

If a Washington appellate court or the Superior Court in a case not appealed, should determine that the decision of the United States Supreme Court in Tyler Pipe Industries, Inc. v. Washington State Department of Revenue, 483 U.S. 312 (1987), applies retroactively and that a refund is required of City business and occupation taxes paid for the period before June 23, 1987, then as to those taxpayers with pending lawsuits, the deductions allowed by Sections 5.44.050 through 5.44.058 shall apply in measuring the amount of refund due within the applicable limitations period. This section shall apply only to the extent that such a court judgment orders a refund to be paid to the taxpayer for the back period as necessary to remedy taxes unconstitutionally collected.

Section 2. The Director of Licenses and Consumer Affairs is authorized to settle any pending cases by allowing a credit against the City business and occupation tax or refund for taxes accrued from June 23, 1987 through June 30, 1987, inclusive, for which a deduction would have been granted if Section 5.44.050 through 5.44.048 had been in effect during those eight days.

Section 3. Any act consistent with the authority but prior to the effective date of this ordinance is hereby ratified and confirmed.

Section 4. This ordinance shall take effect and be in force thirty days from and after its passage and approval, if approved by the Mayor. After that time, if not vetoed at the time it shall become a law under the provisions of the city charter.

Passed by the City Council the 28th day of August, 1990, and signed by the Mayor in session in authentication of its passage this 28th day of August, 1990.

President Pro Tem of the City Council,  
Approved by me this 24th day of August, 1990,  
MAYOR  
MARGARET B. RICE

Attest:  
NORWARD J. BROOKS,  
City Comptroller and City Clerk,  
Signed By MARGARET CARTER,  
Deputy Clerk.

Publication ordered by NORWARD J. BROOKS, Comptroller and City Clerk, September 6, 1990.  
Date of official publication in Daily Journal of Commerce, Seattle, 9/6/1990.