

FINDINGS AND DECISION  
OF THE HEARING EXAMINER FOR THE CITY OF SEATTLE

In the Matter of the Appeal of

KAL KAN FOODS, INC.

HEARING EXAMINER  
FILE NO. B-87-001

from a B & O Tax determination  
by the Department of Licenses  
and Consumer Affairs

Introduction

This matter came on for hearing on December 17, 1990 before the Hearing Examiner. The purpose of the hearing was to determine the amount of tax due on the appeal of Kal Kan, Inc. (appeals dated September 2, 1987, October 14, 1987, and January 3, 1990).

The City of Seattle was represented by Mark H. Sidran, City Attorney, through Jorgen G. Bader, Assistant City Attorney. Kal Kan Foods, Inc. rested its appeal on the record of its letters of appeal; G. Kim Risenmay, attorney for Kal Kan, Inc., advised by telephone that counsel would not appear at the hearing. The City of Seattle submitted a Memorandum and called David Heleniak, Supervising Tax Auditor, as a witness to make formal proof. The City also submitted proposed Findings of Fact and Conclusions of Law.

Findings of Fact

1. This is an appeal by Kal Kan Food, Inc., ("Kal Kan") from a debit note issued by the Director of Licenses and Consumer Affairs on October 2, 1987. Kal Kan's appeal was in the form of a letter to the Director, dated September 2, 1987, and an appeal to the Office of Hearing Examiner, dated October 14, 1987, and a subsequent letter, dated January 3, 1990.

2. The appeal was based on the Commerce Clause of the United States Constitution and arguments that were ultimately sustained with respect to state business and occupation taxes in Tyler Pipe Industries, Inc. v. Washington State Department of Revenue, 483 U.S. 232, 97 L.Ed. 2d 199, 80 S.Ct. 2810 (1987).

3. The Office of Hearing Examiner has jurisdiction of the appeal pursuant to Seattle Municipal Code ("SMC") Section 5.44.230.

4. Kal Kan is a corporation organized and existing under

the laws of the State of Delaware and engages in business

activities in Seattle. It sells products in Seattle that it has manufactured outside Washington.

5. The City of Seattle is a municipal corporation of the State of Washington. It imposes a business and occupation tax ("the tax") pursuant to Seattle Municipal Code Chapter 5.44. It administers the tax through its Department of Licenses and Consumer Affairs.

6. SMC Section 5.44.030 imposes the tax upon everyone engaging in business activities in Seattle. The tax has multiple classifications. Under the multiple activity exclusion, SMC section 5.44.050, taxpayers who engage in activities within two or more classifications in Seattle were subject to tax under only one classification. In Tyler Pipe Industries, Inc., the United States Supreme Court ruled that such a multiple activity exclusion for intrastate business alone in the State Business and Occupation tax violated the Commerce Clause of the United States Constitution.

7. By Ordinance 113611, effective July 1, 1987, the City amended SMC Chapter 5.44 to provide for a deduction for certain gross receipts taxes paid by a taxpayer engaging in business activities within two or more classifications both within Seattle and outside. Ordinance 115259 made the deduction retroactive to June 23, 1987 for those taxpayers like Kal Kan with pending appeals. The City's amendments were patterned after changes to state statute upheld in American National Can Corp. v. Washington Department of Revenue, 114 Wn.2d 236, 787 P.2d 545 (1990).

8. Kal Kan paid its business and occupation taxes measured by its gross receipts, through the first quarter of 1987. It filed quarterly tax returns without remittances for the second, third and fourth quarters of 1987, and the first two quarters of 1988. These filings were accompanied by a letter or note stating that Kal Kan was claiming a credit for taxes paid during the 4th quarter of 1984, the years 1985 and 1986, and the first quarter of 1987, which it considered to be illegally exacted under the Tyler Pipe Industries, Inc. decision of the U.S. Supreme Court.

9. Kal Kan sued the City for a refund of taxes paid based on the Commerce Clause to the United States Constitution. Kal Kan Foods, Inc., v. City of Seattle, King County Superior Court Cause No. 87-2-16039-4. Both parties moved for summary judgment. On August 21, 1990, the Superior Court entered partial summary judgment in favor of the City. The judgment states:

IT IS ORDERED that the complaint is dismissed with prejudice as to taxes paid during the period October 1, 1984 through the first quarter of 1987 and July 1, 1988 to date.

Taxes for the period April 1, 1987 through June 30, 1988 shall await determination pursuant to the City's counterclaim for unpaid taxes.

The judgment cites National Can Corp. v. Washington Department of Revenue, 109 Wn.2d 878, 749 P.2d 1286 (1988) and its ruling that the Tyler Pipe Industries, Inc., decision applies as of June 23, 1987.

10. The Superior Court judgment has the effect of ruling that the taxes paid from October 1, 1984 through the first quarter of 1987 were validly collected.

11. The Department of Licenses and Consumer Affairs disallowed the taxpayer's claimed credit on the basis that taxes which were validly collected cannot be used as a credit for payment of taxes in subsequent quarters. Using the gross receipts reported by Kal Kan on its returns for the second quarter of 1987 through June 30, 1988, the Department of Licenses and Consumer Affairs determined the amount of taxes due and interest added to be as follows:

Computation of Interest at 10% per annum Through  
December 31, 1990

	<u>4/1/87 - 12/31/87</u>	<u>1/1/88 - 6/30/88</u>	<u>Total</u>
Tax Due	\$16,790.45	\$11,970.18	\$28,860.63
Interest Rate	30%	20%	
Interest Due	<u>\$ 5,037.14</u>	<u>\$2,394.04</u>	<u>\$ 7,431.18</u>
Total	\$21,827.59	\$14,364.04	\$36,191.81

12. The Department of Licenses and Consumer Affairs calculated interest at ten percent (10%) per annum. It did not assess any late payment penalty.

13. The Department of Licenses and Consumer Affairs determined the total amount of taxes and interest due and owing from Kal Kan to the City to be \$36,191.81.

14. SMC Section 5.44.230 provides that on appeal, the tax determination by the Director of Licenses and Consumer Affairs is to be considered prima facie correct and may be reversed or modified by the Hearing Examiner if the determination violates SMC Chapter 5.44 or is contrary to law.

15. Kal Kan made no offer of proof, did not appear at hearing, and did not contest the proposed findings and conclusions submitted by the City.

Conclusions

1. SMC Chapter 5.44 imposes a business and occupation tax upon everyone engaging in business activities in Seattle. Kal Kan is subject to the tax.

2. The Superior Court judgment in Kal Kan Foods, Inc. v. City of Seattle, King County Superior Court Cause No. 87-2-16039-4, in dismissing Kal Kan's complaint, determined that the City had validly collected the taxes for the period October 1, 1984 through the first quarter of 1987. It also upheld the validity of taxes from July 1, 1988 to date. The court's rulings disallow Kal Kan's claim of credit for taxes paid during the interim.

3. SMC Section 5.44.210 C provides for interest at 10% per annum on underpaid taxes.

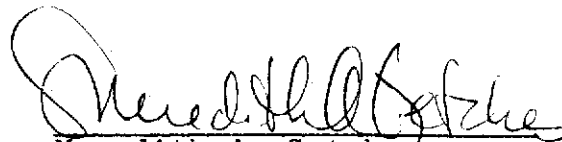
4. Based on the record, the Hearing Examiner concludes that the tax determination is consistent with the terms of SMC 5.44 and is not contrary to law.

5. Kal Kan Foods, Inc., owes the City of Seattle unpaid business and occupation taxes in the amount of twenty eight thousand seven hundred sixty dollars and sixty-three cents (\$28,760.63), together with interest accrued through December 31, 1990 of seven thousand four hundred thirty-one dollars and eighteen cents (\$7,431.18), for a total sum due of thirty six thousand one hundred ninety one dollars and eighty-one cents (\$36,191.81) as of December 31, 1990.

Decision

The determination of the Director of Licenses and Consumer Affairs that as of December 31, 1990, Kal Kan Foods, Inc., owes the City of Seattle unpaid business and occupation taxes in the amount of twenty eight thousand seven hundred sixty dollars and sixty-three cents (\$28,760.63) and seven thousand four hundred thirty-one dollars and eighteen cents (\$7,431.18), for a gross sum due of thirty six thousand one hundred ninety one dollars and eighty-one cents, (\$36,191.81), is SUSTAINED.

Entered this 18th day of January, 1991.



Meredith A. Getches  
Hearing Examiner

CONCERNING FURTHER REVIEW

The decision of the Hearing Examiner in this case is the final administrative determination by the City, and is not subject to reconsideration except to correct errors on the ground of fraud, mistake, or irregularity in vital matters. Any request for judicial review must be filed with the Superior Court pursuant to Chapter 7.16, RCW, within fourteen days of the date of this decision. Should such a request be filed, instructions for preparation of a verbatim transcript are available at the Office of Hearing Examiner. The appellant must initially bear the cost of the transcript but will be reimbursed by the City if the appellant is successful in court. Instructions for preparation of the transcript are available from the Office of Hearing Examiner, Room 1320 Alaska Building, 618 Second Avenue, Seattle, Washington 98104.