

Cite as Det. No. 05-0027, 26 WTD 87 (2007)

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)	
)	No. 05-0027
)	
. . .)	Registration No. . . .
)	TI&E Letter Ruling
)	Docket No. . . .
)	

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.

Rule 115; RCW 82.08.0282, RCW 82.12.0276: RETAIL SALES TAX – USE TAX – RETURNABLE CONTAINERS FOR FOOD AND BEVERAGES. Wire baskets used to transport egg crates are not exempt from sales and use tax as “returnable containers for beverages and foods.” “Containers for beverages and foods” refers to containers in which the beverages and foods are sold to the ultimate customer, and the wire baskets do not directly contain the eggs. Neither are the wire baskets “returnable,” since they are not sold along with their contents to the customer, but are merely “re-used” by the taxpayer to transport eggs.

STATEMENT OF CASE

Rosenbloom, A.L.J. – . . . (Taxpayer) requests a determination that wire baskets used to transport egg crates to its . . . stores are exempt from retail sales and use tax under RCW 82.08.0282 and RCW 82.12.0276, which provide sales and use tax exemptions for “returnable containers for beverages and foods.” We conclude that the wire baskets do not qualify for the exemptions.¹

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

ISSUE

Are wire baskets used to transport egg crates “returnable containers for beverages and foods” and therefore exempt from retail sales and use tax?

FINDINGS OF FACT

Taxpayer purchases eggs at wholesale from a Washington egg producer for sale in its retail grocery stores. Taxpayer describes the distribution process as follows:

The egg producer is located in the state of Washington and he sells us eggs which we sell in our . . . stores. The egg producer delivers the eggs packaged in crates and [wire] baskets to our distribution centers in the state of Washington. From the distribution centers, we deliver the eggs packaged in crates and [wire] baskets to our stores where the egg crates are removed from the wire baskets for display for sale. The wire baskets are then delivered back to our distribution centers and are picked up by the egg producer and he reuses the [wire] egg baskets as the logistics cycle is repeated.

The taxpayer purchased the wire baskets from an [out of state] vendor. Because the vendor did not collect retail sales tax on the wire baskets at the time of sale, Taxpayer paid use tax on the wire baskets directly to the Department of Revenue (Department).

Subsequently, the taxpayer wrote to the Department’s Taxpayer Information and Education Section (TI&E) asking whether the wire baskets were properly subject to use tax. TI&E responded with a letter ruling advising that the wire baskets were taxable. Taxpayer then filed this petition for correction of the letter ruling.

ANALYSIS

RCW 82.08.0282 provides the following retail sales tax exemption:

The tax levied by RCW 82.08.020 [retail sales tax] shall not apply to sales of returnable containers for beverages and foods, including but not limited to soft drinks, milk, beer, and mixers.

The corresponding use tax exemption is contained in RCW 82.12.0276, which provides:

The provisions of this chapter [use tax] shall not apply in respect to the use of returnable containers for beverages and foods, including but not limited to soft drinks, milk, beer, and mixers.

The wire baskets are “containers” in the broadest sense of the word; however, the exemptions are limited to “containers for beverages and foods.” In addition, the containers must be “returnable.”

WAC 458-20-115 (Rule 115) illustrates the distinction between “containers” in general, and the narrower category of “containers for beverages and foods” as follows:

(3) Business and occupation tax.

(b) Sales of *containers* to persons who sell tangible personal property therein, but who retain title to such containers which are to be returned, are sales for consumption and subject to tax under the retailing classification. . . . *However, refer to the comments below for sales of containers for beverages and foods.*

(c) Title to *containers*, whether designated as returnable or nonreturnable, *for beverages and food* sold at retail, including beer, milk, soft drinks, mixers and the like, will be deemed to pass to the customer along with the contents. In such cases, amounts charged for the containers are part of the selling price of the food or beverage and subject to retailing tax when sold to consumers. Sales to persons who will resell the food or beverages are wholesale sales.

(4) Retail sales tax.

(a) All sales taxable under the retailing classification of the business and occupation tax as indicated above are also subject to retail sales tax except those specifically distinguished hereafter in this subsection.

(b) Retail sales tax does not apply to sales of *returnable food and beverage containers*, and vendors may take a deduction from gross retail sales for the amount of such sales in reporting sales tax due, providing (i) the seller separately states the charge for the container and (ii) the separately stated charge is the amount the vendor will pay for a repurchase of the container

(5) Use tax.

(a) The use tax applies to uses of packing materials and containers to which retail sales tax would apply but, for any reason, was not paid at the time such materials and containers were acquired.

(Emphasis added.) It is clear from the context of Rule 115 that “containers for beverages and foods” refers to the containers in which the beverages and foods are sold to the ultimate customer. For example, the egg crates displayed and sold in Taxpayer’s . . . stores are “containers for beverages and foods.”

Under Rule 115(3) (c), title to the egg crates is deemed to pass to the customer along with the contents, and the entire selling price for the eggs and egg crates is subject to Retailing B&O tax. Retail sales tax does not apply because eggs are exempt under the food and food ingredient exemption provided in RCW 82.08.0293. If Taxpayer charged a separate price for the egg crates, and the separately stated charge was the same amount Taxpayer would pay to repurchase the egg crates, then the egg crates would qualify for a retail sales tax exemption as “returnable containers for beverages and foods.” Rule 115(4) (b).

However, the provisions of Rule 115(3) (c) and (4)(b) do not apply to the wire baskets, because they are not sold along with their contents to the customer. Thus, while the wire baskets are “containers” in the broadest sense of the term, they are not “containers for beverages and foods.”

Furthermore, tax exemptions are strictly construed against taxpayers. *Budget Rent-a-Car, Inc. v. Department of Rev.*, 81 Wn.2d 171, 500 P.2d 764 (1972). The wire baskets do not directly contain food; rather, they contain the egg crates that actually contain the food. Strict construction requires that the exemptions provided in RCW 82.08.0282 and RCW 82.12.0276 be limited to containers that actually contain beverages or foods.

Even if the wire baskets were “containers for beverages and foods” they would fail to qualify for exemption because they are not “returnable” as required by RCW 82.08.0282 and RCW 82.12.0276. Taxpayer uses the wire baskets to transport eggs from the egg producer to Taxpayer’s distribution centers, and then to its own retail grocery stores. Taxpayer does not sell the wire baskets to its customers, and then repurchase them. Thus, while the wire baskets may be “reusable,” they are not “returnable” as contemplated in Rule 115(4)(b)

We conclude that the wire egg baskets are not “returnable containers for beverages and foods” and therefore do not qualify for the retail sales and use tax exemptions provided in RCW 82.08.0282 and RCW 82.12.0276.

Taxpayer retains title to and possession of the wire baskets at all times. Thus, the sale of the wire baskets to Taxpayer was a retail sale, and would have been subject to retail sales tax if purchased from a Washington vendor. Rule 115(3) (b) and (4) (a). Because Taxpayer purchased the wire baskets from an out-of-state vendor and did not pay retail sales tax at the time of purchase, use tax was properly paid. Rule 115(5) (a).

In further support of its position, Taxpayer states that at least nineteen other states expressly exempt food containers from tax, thereby placing Washington’s agricultural industry at a competitive disadvantage. Finally, Taxpayer used disposable corrugated cardboard boxes prior to acquiring the wire baskets. Thus, Taxpayer asserts that a conclusion that its reusable wire baskets are not exempt would run counter to promoting an ecological, environmentally friendly state policy.

As to these further arguments, the Department, as an administrative agency, has no authority to grant an exemption where none exists in the law. Only the legislature, through enactment of appropriate legislation, may do so. *See Budget Rent A Car*, 81 Wn.2d 171.

DECISION AND DISPOSITION

Taxpayer’s petition for correction is denied.

Dated this 1st day February of 2005.