Cite as 11 WTD 139 (1991).

BEFORE THE INTERPRETATION AND APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition For Refund of	D E T E R M I N A T I O N
	No. 91-103
. . .	Registration No. . . . Audit No. . . .

[1] RULE 195: RULE 111 -- B&O TAX -- DEDUCTION -- WINE TAX -- REIMBURSEMENT OF. The federal wine tax is a liquor tax for the purpose of applying Rule 195. Liquor taxes are not deductible from the measure of the B&O tax even by a party who only stores wine for the maker of the wine and is reimbursed by the maker for the tax.

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.

TAXPAYER REPRESENTED BY: . . .

DATE OF HEARING: August 11, 1988

NATURE OF ACTION:

Protest of the inclusion of the federal wine tax in the measure of the taxpayer's B&O tax.

FACTS AND ISSUES:

Dressel, A.L.J. -- [Taxpayer] operates a licensed, bonded wine storage facility available to wineries seeking off-site, bonded, storage space for their wine products. The taxpayer's books and records were examined by the Department of Revenue (Department) for the period of January 1, 1984 through December 31, 1986. As a result, a tax assessment, identified by the above-captioned number, was issued which, actually,

gave the taxpayer a net credit of $ . . . in overpaid state excise taxes. The taxpayer has filed this appeal in which it asserts that the credit should have been greater.

Wineries which ship products located at their facilities to distributors pay federal wine tax directly to the Internal Revenue Service on those outgoing shipments. With the enactment of RCW 66.24.185, "off-premise", bonded storage facilities, such as that of the taxpayer, ship directly to distributors as well. The taxpayer reports and pays federal wine taxes on such shipments. The wineries, whose products the taxpayer is storing, in turn, reimburse the taxpayer for taxes paid on shipments originating at the taxpayer's warehouse.

In reporting its business and occupation (B&O) taxes to the Department, the taxpayer omitted these tax reimbursements from its measure of tax. The Department's auditor thought they should be included and did so in his audit.

The taxpayer argues that the reimbursements should not be taxed as they are not "revenue" items. It says that the federal wine tax would be collected regardless of the existence of the taxpayer's off-premise facility. The taxpayer does not own the wine, it merely stores it for another party. It acts as a conduit for the flow of taxes in that it passes them from the winery to the federal government. The taxpayer asks that these tax reimbursements be found exempt of the B&O tax under WAC 458-20-195 (Rule 195) or by special interpretative ruling.

The Department's auditor, on the other hand, relies on Rule 195 as the authority for disallowing the claimed exemption/deduction. He says that the wine tax is imposed primarily on the taxpayer, as opposed to the taxpayer's customer, so the taxpayer may not deduct the reimbursements it receives from those customers. He further states that the federal wine tax is specifically listed in Rule 195 as one which is not deductible.

The issue is whether a bonded, off-premise wine storage facility may exclude from the measure of its B&O tax amounts received from winery customers to pay the federal wine tax.

DISCUSSION:

[1] The B&O tax, in the case of a service provider, is imposed on the gross income of the business. RCW 82.04.220.

"Gross income of the business" is defined, thusly, at RCW 82.04.080:

> "Gross income of the business" means the value proceeding or accruing by reason of the transaction of the business engaged in and includes gross proceeds of sales, compensation for the rendition of services, gains realized from trading in stocks, bonds, or other evidences of indebtedness, interest, discount, rents, royalties, fees, commissions, dividends, and other emoluments however designated, all without any deduction on account of the cost of tangible property sold, the cost of materials used, labor costs, interest, discount, delivery costs, taxes, or any other expense whatsoever paid or accrued and without any deduction on account of losses. (Emphasis ours.)

Rule 195 does provide, however, that taxes collected by a taxpayer as an agent for a taxing authority are an exception. They may be deducted, provided they are included in the gross amount reported. The rule further states:

> This deduction applies only where the amount of such taxes is received by the taxpayer as collecting agent and is paid by the agent directly to the state, its political subdivisions, or to the federal government. When the taxpayer is the person upon whom a tax is primarily imposed, no deduction or exclusion is allowed, since in such case the tax is a part of the cost of doing business. The mere fact that the amount of tax is added by the taxpayer as a separate item to the price of goods he sells, or to the charge for services he renders, does not in itself, make such taxpayer a collecting agent for the purpose of this deduction.

The taxpayer has stated that it is required by the federal government to pay the wine tax at the time products it is storing leave its facility for distribution or sale.[1] Indeed, the applicable federal statutes and regulations seem to support the taxpayer's belief that it, not the winery, must pay such taxes. 27 CFR 240.591 states, in part:

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[1] See also 27 CFR 240.590.

> The proprietor shall include for payment on his return, Form 2050, the full amount of tax required to be determined (and not prepaid) on all wine removed daily from the bonded wine cellar premises (or transferred to a taxpaid room on the premises) for consumption or sale during the period covered by the return. (Italics ours.)

27 CFR 240.901 states that the proprietor of every bonded wine cellar will prepare tax Form 2050. Bonded wine cellars include those premises which only store wine. 26 U.S.C. 5351 and 27 CFR 240.120. See also 27 CFR 240.122. "Proprietor" is defined at 27 CFR 240.10 as the operator of a bonded wine cellar. The proprietor of a bonded wine cellar is the party who pays the wine tax. 26 U.S.C. 5043. We, thus, conclude that the taxpayer is the proprietor of a bonded wine cellar who is liable, in fact, primarily liable, for the federal wine tax. The taxpayer is not collecting the tax from another party who is primarily liable for it. The taxpayer, itself, is primarily liable. Thus, the taxpayer is not a collecting agent for a taxing authority. It pays the tax as the principal which owes the tax. The fact that it is reimbursed for the amount of the tax does not change the fact that it has primary liability to the United States for the tax.

Additionally, as noted by the auditor, Rule 195 specifically lists, or almost specifically lists, the federal wine tax as one which may not be deducted from the measure of the B&O tax. In the rule are listed specific federal, state, and municipal taxes which may be deducted and which may not be deducted. Among those listed which may not be deducted are federal "liquor taxes". Although one might first be able to make the visceral argument that a wine tax is not a liquor tax, that a liquor tax should be applied to hard liquor, such argument is defused when one looks to the right of the listing "liquor taxes" in the rule where it says "26 U.S.C.A. chapter 51". The title in the Internal Revenue Code for Chapter 51 (of 26 U.S.C.A.) is "Distilled Spirits, Wines, and Beer". Chapter 51 covers all three varieties of alcoholic beverages. We presume that if the drafters of the rule had intended that only one of the three be deductible, they would have been more specific in both their verbiage and their citation. We think the better construction is that "liquor" includes distilled spirits, wine, and beer. 26 U.S.C.A. Chapter 51 certainly does. Therefore, we conclude that federal taxes on each of those alcoholic beverages are not deductible from the measure of the B&O tax. Such taxes are instead part of the taxpayer's costs of doing business. Rule 195 and RCW 82.04.080.

As to the taxpayer's argument that it is not an owner of the wine, we have discovered no authority that says that is required for either the B&O or the wine tax to be assessed. Neither is the fact that the wine tax is not a "revenue" item determinative of whether the B&O tax applies. The B&O tax is based on gross receipts, not net income. RCW 82.04.220 and RCW 82.04.080.

As to the taxpayer's request that Rule 195 be amended to allow for the deduction of liquor taxes, we do not believe it should be. As written, it is consistent with one of the primary statutes it implements, RCW 82.04.080. Until overturned by a court of law, duly adopted administrative regulations such as Rule 195 have the same force and effect as the statutory law of Title 82 RCW. RCW 82.32.300.

DECISION AND DISPOSITION:

The taxpayer's petition is denied.

DATED this 24th day of April 1991.