Cite as 11 WTD 135 (1991).

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

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| RECONSIDERATION | |
| In the Matter of the Petition For Reconsideration of | ) DETERMINATION<br>)<br>) No. 91-097R<br>) |
| . . . | ) Registration No. . . .<br>) . . ./Audit No. . . .<br>) . . ./Audit No. . . . |

[1] RCW 70.93.120,.150, RULE 243: LITTER TAX -- OUT-OF-STATE WHOLESALER. The litter tax applies to manufacturers, wholesalers, and retailers. The tax is imposed on the successive sales of the same goods from the manufacturer to the wholesaler then to retailer then to the consumer. Accord: Det. No. 88-386, 6 WTD 459 (1988).

[2] RULES 243 AND 193B: LITTER TAX -- OUT-OF-STATE WHOLESALER -- NEXUS. An out-of-state wholesaler who has nexus with Washington need not have a place of business in this state before the litter tax applies.

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: . . .

## NATURE OF ACTION:

The taxpayer appeals the portion of Det. No. 91-097 which sustained litter tax assessments.

## FACTS

De Luca, A.L.J. -- The facts in this matter are stated in Det. No. 91-097 and will not be restated except where necessary.

In brief, the taxpayer is an out-of-state wholesaler of . . . food products. The taxpayer makes all of its Washington sales through in-state direct seller's representatives. Even though Det. No. 91-097 found the taxpayer's activities in Washington were sufficient to create taxable nexus, the determination held the taxpayer was exempt from B & O tax due to RCW 82.04.423 and WAC 458-20-246 (Rule 246). However, Det. No. 91-097 upheld the litter tax assessments because the B & O tax exemption for sales to direct seller's representatives did not also exempt the sales from the litter tax.

TAXPAYER'S EXCEPTIONS

1. The taxpayer cites RCW 70.93.150 and argues its sales are not for use and consumption, but are for re-sale and, therefore, not subject to the litter tax.

2. The taxpayer next cites RCW 70.93.130 and argues the statute applies to the products themselves, but not to the selling of the products. The taxpayer contends it is both discriminatory and contrary to the statute to impose the tax when the products are sold at wholesale and then again when they are sold at retail. Therefore, the tax should only apply to the Washington retailers.

3. Lastly, the taxpayer contends Rule 243 requires the taxpayer to have a "place of business" in Washington, such as "any location, department, or division", before the tax applies. The taxpayer notes it has no such place here.

DISCUSSION:

The tax is imposed by RCW 70.93.120, which states in relevant part:

> There is hereby levied and there shall be collected by the department of revenue from every person engaging within this state in business as a manufacturer and/or making sales at wholesale and/or making sales at retail, an annual litter assessment . . . equal to the gross proceeds of the sales of the business within this state multiplied by one and one-half hundredths of one percent in the case of sales at wholesale and/or at retail.

Sales are defined by RCW 70.93.150:

> 'Sold within this state' or 'sales of the business within this state' as used in RCW 70.93.120 shall

> mean all sales of retailers engaged in business within this state and all sales of products for use or consumption within this state in the case of manufacturers and wholesalers.

The tax is imposed on the gross proceeds of sales of food for human or pet consumption or groceries, as well as glass, metal and plastic containers, among other things. RCW 70.93.130. The taxpayer does not contest that its food products and their containers are included within the products designated as subject to the tax. Rather, it argues the tax does not apply to its wholesaling/sales for re-selling activities.

[1] The plain language of RCW 70.93.120 and .150 makes clear the litter tax applies to wholesalers who sell such products for use or consumption within this state.

Furthermore, the Department has ruled the tax not only applies to wholesalers (sales for re-sale), it also applies to successive transactions of the same goods. The case involved an out-of-state wholesale distributor of dried bulk food products.

> .... The imposition of the tax is also consistent with the obvious statutory intent to spread responsibility for the litter tax among more than just the retailer who makes the final dispensation of the product.
>
> It is immaterial that the actual litter-causing event (distribution to a consumer) may only occur at the retailing level. The legislature has equitably decided that the cost of ridding the countryside of such things as bottles, boxes and other litter should be borne in part by all businesses, at whatever level, which contribute to the production and sale of such articles.
>
> Imposition of the litter tax on manufacturers and wholesalers, as well as on retailers, is consistent with the opinion expressed by the Washington State Board of Tax Appeals in *Bonanza Packing Company v. Department of Revenue*, Docket 77-56 (May 25, 1978), affirmed in Spokane County Superior Court Cause No. 247257 (1983), wherein the board stated:
>
> '. . . Thus, the appellant puts into the stream of commerce a product that will need to be wrapped and

> may cause litter. The clear purpose of the act is that everyone in such a chain--the manufacturer, wholesaler and retailer--of such products should help pay for the administration [of the act] . . . (Brackets supplied.)'
>
> Manufacture and wholesale sale is the original source of the litter problem which usually results after a series of product transfers or sales. The legislature recognized this fact and enacted a tax that tends to pyramid from manufacturer to wholesaler, wholesaler to retailer, and retailer to consumer in the same manner as the business and occupation tax. Thus, the law does not limit the litter tax to the persons who first sell a taxable product boxed, wrapped, bagged, canned, or bottled with litter-producing materials. Rather, the tax is imposed upon the manufacture and subsequent sale of the product or significant ingredients. If the legislature had intended that the litter tax was to be extended only to retailers of the ultimate product consumed, it would have phrased the statute(s) accordingly.

Det. No. 88-386, 6 WTD 459 (1988).

[2] The last argument is whether the taxpayer must have "a place of business" in Washington, e.g. "any location, department, or division", before the tax applies. Although Rule 243 does state the tax "appl[ies] to places of business on sales of products falling into the thirteen categories listed in RCW 70.93.130 ...", there is no mentioning of such a requirement in the statutes. They require only a wholesaler to make sales of products for use or consumption within this state. We have shown the taxpayer makes such sales. The rule must be construed consistently with the governing statute. Administrative rules cannot exceed or conflict with the scope of the statutes they interpret. Duncan Crane v. Department of Rev., 44 Wn.App. 684, 723 P.2d 480 (1986).

Furthermore, we wrote in Det. No 91-097:

> Rule 243 states the law intends the tax be limited to sales within this state. The rule provides that "out-of-state firms making sales in or into Washington will be subject to the litter tax under the principles set out for business and occupation tax in WAC 458-20-193B.

Therefore, when applying the litter tax to out-of-state sellers, Rule 243 specifically addresses Rule 193B. The criteria in Rule 193B do not require a taxpayer to have a place of business in Washington before its taxes apply. We concluded Det. No. 91-097:

> [Taxpayer]'s visits to trade shows and to the brokers and their customers are sufficient to support a finding of nexus between taxpayer and Washington. Taxpayer is subject to litter tax on its sales in Washington.

DECISION AND DISPOSITION:

We affirm Det. No. 91-097. The taxpayer's petition for reconsideration is denied. The taxpayer has asked us to clarify our decision. We held the B & O tax assessments are cancelled. However, we sustained the litter tax assessments and referred the file to Audit to calculate the amount of litter tax due. Of course, the amount of litter tax owing is to be determined from the above-referenced audits. This determination constitutes the final action of the Department of Revenue in this matter. If you wish to appeal this adverse ruling, you have the right to appeal to the State Board of Tax Appeals under RCW 82.32.190 or pay the assessments and seek a refund directly in Superior Court under RCW 82.32.180.

DATED this 10th day of June 1991.