

Cite as Det. No. 92-032, 12 WTD 73 (1993).

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

In the Matter of the Petition)	<u>D E T E R M I N A T I O N</u>
For an Interpretation of Tax)	
Liability of)	
)	No. 92-032
)	
. . .)	Registration No. . . .
)	
)	

[1] RULE 178, RULE 112, RULE 134: USE TAX -- WINERY -- WINE SAMPLES -- DEFECTIVE BOTTLES -- MEASURE OF TAX. The measure of use tax on damaged or "off condition" bottles of wine used to pour samples at the tasting room of a winery is the retail selling price, if it can be determined, of such "off condition" bottles as opposed to the retail selling price of undamaged bottles of the same wine.

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: . . .

NATURE OF ACTION:

Winery protests prospective instruction from Audit Division that use tax on samples will be based on retail selling price of an undamaged bottle of wine.

FACTS AND ISSUES:

Dressel, A.L.J. -- . . . (taxpayer) is a winery. In a recent audit of its books and records by the Department of Revenue (Department), it was instructed to, henceforth, pay use tax on wine samples based on the retail selling price of an undamaged bottle of wine. Inasmuch as it had been instructed in a previous audit to measure such tax by the cost of production of a bottle

of wine, the Department's auditor accepted such tax reporting for the recent audit period but stated he would no longer do so after that period. The taxpayer protests such instruction and has petitioned the Interpretation and Appeals Division of the Department for a ruling on this issue.

The taxpayer maintains a tasting room at its production facility in Central Washington. Visitors are given samples of the wines produced by the taxpayer. Samples are dispensed in regular wine glasses but only in one ounce portions. Eighty-five percent of the samples are poured from bottles, described by the taxpayer, as "off condition". "Off condition" bottles are those not completely filled (low fill bottles), and those which have slight defects in the label, cork, or "capsule". "Off condition" bottles of wine are not sold to customers at full retail price. Those that are not used to dispense samples are sold only in the tasting room at discounted prices, \$1.45 to \$2.00 per bottle, depending on the variety. These numbers represent the taxpayer's costs of producing the wine. Fifteen percent of the wine poured as samples is from "regular" bottles which are in marketable condition with no defects.

The Audit Division takes the position that the measure of use tax ought to be the retail selling price of a defect-free bottle of wine. They reason that a visitor to the tasting room would not know the difference between wine poured from a defect-free (good) and a defective (bad) bottle, so the use tax measure for the latter ought to be the same as for the former.

The taxpayer opines that the retail selling price of a bad bottle of wine is its cost of production because that is, in fact, the price at which the taxpayer sells such bottles in its tasting room. If that is correct, the taxpayer states that because most of the wine samples come from such bad bottles, the cost of production should be the measure of use tax for those samples.

The issue is whether the measure of use tax on wine samples poured from defective bottles of wine is the cost of production or the retail selling price of a non-defective bottle of wine.

DISCUSSION:

[1] RCW 82.12.020 states that the use tax is levied upon a "consumer" measured by the "value of the article used." In this situation, the taxpayer is the "consumer" of the wine samples given away because RCW 82.12.010(5) includes within the meaning of that word

. . . any person who distributes . . . any article of tangible personal property, . . . the primary purpose of which is to promote the sale of products

See also WAC 458-20-178 (Rule 178).

The measure of the use tax is the "value of the article used" which is the "retail selling price." RCW 82.12.010(1). Thus, because the taxpayer is statutorily defined as the consumer of the wine samples, it is liable for use tax on the retail selling price of the same. The use tax applies in this case because the wine samples are "promotional," i.e., they promote the taxpayer's business. Det. No. 87-158, 3 WTD 137, 138-139 (1987).

The narrow issue in this case then becomes what is the retail selling price of the wine samples. With regard to use tax on items manufactured or produced by a taxpayer, Rule 178 has some specific language. It states, in part:

In case the article used was extracted or produced or manufactured by the person using the same or was acquired by gift or was sold under conditions where the purchase price did not represent the true value thereof, the value of the article used must be determined as nearly as possible according to the retail selling price, at the place of use, of similar products of like quality, quantity and character.

(Emphasis supplied.)

In this case the place of use is the taxpayer's tasting room. A product "similar", to the one the taxation of which is primarily at issue, is an "off condition" bottle of wine. Eighty-five percent of the wine samples given out are from such bottles. Undamaged bottles are not "of like quality, quantity, and character" as compared to the defective bottles at issue. The former are in good condition. The latter are not. Therefore, using the retail selling price of undamaged bottles as the measure of use tax for damaged bottles is an erroneous practice.

When asked, the taxpayer's representative was not aware whether other wineries sell damaged bottles of wine at prices similar to those charged by the taxpayer at its tasting room. While we have no evidence on this subject, we believe the taxpayer's policy of selling defective bottles at cost is reasonable. It has been following that practice for a number of years. We assume that if the taxpayer could move the defective bottles of wine at a higher price, it would do so.¹ Also, given the fact that the taxpayer's

¹Furthermore, WAC 458-20-112 states, in part, that "In the absence of sales of similar products as a guide to value, such value may be determined upon a cost basis." (Emphasis supplied.)

wines generally sell at about \$5.00 a bottle, \$1.45 to \$2.00 seems reasonable for an underfilled or otherwise defective bottle. We conclude that the retail selling prices of defective bottles of the taxpayer's wine are the amounts at which it sells such whole bottles at its tasting room.

We rule, therefore, that the taxpayer may continue to use its cost of producing a bottle of wine as the measure of use tax on bottles it utilizes for sampling purposes, as long as it continues to sell such defective bottles at cost. We qualify that statement by saying that it is limited to those samples dispensed from defective bottles. The 15% of samples which come from undamaged bottles are subject to use tax based on the retail selling price of an undamaged bottle of wine, presently in the range of \$5 as determined by the Audit Division.

DECISION AND DISPOSITION:

The taxpayer's petition is granted in part.

This legal opinion may be relied upon for tax reporting purposes and as support of the reporting method in the event of an audit. This ruling is issued pursuant to WAC 458-20-100(9) and is based upon only the facts that were disclosed by the taxpayer. In this regard, the Department has no obligation to ascertain whether the taxpayer has revealed all of the relevant facts or whether the facts disclosed are actually true. This legal opinion shall bind this taxpayer and the Department upon these facts. However, it shall not be binding if there are relevant facts which are in existence but have not been disclosed at the time this opinion was issued; if, subsequently, the disclosed facts are ultimately determined to be false; or if the facts as disclosed subsequently change and no new opinion has been issued which takes into consideration those changes. This opinion may be rescinded or revoked in the future; however, any such rescission or revocation shall not affect prior liability and shall have a prospective application only.

DATED this 14th day of February, 1992.

Even if we did not accept the taxpayer's determination of the retail selling price of an "off condition" bottle of wine, based on this provision of Rule 112, the measure of use tax would be the same figure anyway because the retail selling price the taxpayer used was its cost, and there is no other evidence of sales of similar products by other parties.