

Cite as Det. No. 95-134E, 15 WTD 149 (1996).

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 Correction of Assessment of)	
)	No. 95-126
)	
. . .)	Registration No. . . .
)	FY. . ./Audit No. . . .
)	

[1] RULE 243; RCW 82.19.020: LITTER TAX -- DROP SHIPMENTS.
The imposition of the litter tax is not dependent upon actual physical possession of the taxable product. Therefore, a wholesaler who orders products drop shipped to its customer is subject to the litter tax.

Headnote is provided as a convenience for the reader and is not in any way a part of the decision or in any way to be used in construing or interpreting this Determination.

NATURE OF ACTION:

The taxpayer protests the assessment of litter tax on baking ingredients and packaging containers which are "drop shipped" to taxpayer's customers on the theory that taxpayer never had physical possession of the items.¹

FACTS:

Coffman, A.L.J. -- The taxpayer is a distributor of baking products and packaging containers (cardboard and plastic). The taxpayer's books and records were reviewed by the Department of Revenue (Department) for the period January 1, 1990 through September 30, 1993. As a result of that review, the Department's Audit Division issued the tax assessment referred to above. The

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

taxpayer filed a timely appeal of the litter tax portion of the tax assessment.²

The taxpayer requested and was granted executive level consideration of its appeal.

The taxpayer operates a business that is "multi-faceted." The taxpayer acts as a direct seller's agent for certain manufacturers. The taxpayer also maintains an inventory of packaging material which it generally sells at wholesale. Some customers did not provide the taxpayer with resale certificates and those customers were charged and paid retail sales tax. The taxpayer does not dispute the Department's findings as they relate to these activities.

The sole area of dispute is the major part of the taxpayer's business: "drop shipments." The taxpayer describes a "drop shipment" as follows: first, the taxpayer receives an order from its customer for certain items (e.g., disposable pie pans); second, the taxpayer places the order with its supplier for the items; third, the order directs the supplier to deliver the items directly to the taxpayer's customer. The taxpayer states that it takes title to the items, but does not have physical possession of them. The taxpayer reports the "drop shipment" sales as wholesale transactions for business and occupation (B&O) tax purposes.

ISSUE:

May the Department impose litter tax where the seller does not take possession of a product the sale of which is otherwise subject to the litter tax?

DISCUSSION:

[1] The litter tax is imposed by RCW 82.19.010³ which states:

[T]here is hereby levied and there shall be collected by the department of revenue from every person for the privilege of engaging within this state in business as a manufacturer, as a wholesaler, or as a retailer, an annual litter tax . . . equal to the gross proceeds of sales of the products listed in RCW 82.19.020 that are sold within this state

(Emphasis added.) See, also, WAC 458-20-243.

² We note that, but for the assessment of the litter tax, the taxpayer overpaid its taxes.

³ This statute was formerly codified as RCW 70.93.120.

The Audit Division found, and the taxpayer agrees, that the products sold are included in those listed in RCW 82.19.020.

The taxpayer states that all "drop shipment" sales were made to persons who have provided resale certificates. RCW 82.04.470. The taxpayer reported the "drop shipment" sales under the wholesaling B&O tax classification on its excise tax returns. "Sale at wholesale" is defined in RCW 82.04.060 as including: "any sale of tangible personal property . . . which is not a sale at retail." "Sale at retail" includes:

every sale of tangible personal property . . . other than a sale to a person who presents a resale certificate under RCW 82.04.470 and who:

(a) Purchases for the purpose of resale as tangible personal property in the regular course of business without intervening use by such person

RCW 82.04.050(1). The definitions found in chapter 82.04 RCW apply to the litter tax. RCW 82.19.040(1).

Under these circumstances the drop shipment sales were wholesale transactions.

As such, the taxpayer's "drop shipment" sales are subject to the litter tax unless an exemption applies. The taxpayer argues that because it never has physical possession of the taxable products, it should be exempt from the litter tax. RCW 82.19.050 states:

Exemptions. The litter tax imposed in this chapter does not apply to:

(1) The manufacture or sale of products for use and consumption outside the state; or

(2) The value of products or gross proceeds of the sales of any animal, bird, or insect or the milk, eggs, wool, fur, meat, honey, or other substance obtained therefrom, if the person performs only the growing or raising function of such animal, bird, or insect.

These are the only exemptions to the litter tax. Our review of the audit report shows that the Department assessed litter tax only on sales to Washington customers. Thus, the first exemption does not apply. The taxpayer does not raise any animal, bird, or insect. Therefore, the second exemption does not apply.

Just as the courts may not extend exemptions to taxation, we may not create exemptions to taxes which are clearly due under the statute. There is no statutory requirement that the wholesaler

have actual physical possession of the taxable products before the litter tax applies. We will not add such a requirement.

DECISION AND DISPOSITION:

The taxpayer's petition is denied.

DATED this 24th day of July, 1995.