

Cite as Det. No. 00-113, 20 WTD 111 (2001)

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>
Letter Ruling)	
)	No. 00-113
)	
...)	Registration No. ...
)	December 15, 1999 TI&E Letter

RULE 255; RCW 82.64.010: CARBONATED BEVERAGE AND SYRUP TAX – CARBONATED BEVERAGE – LIQUID. Nonalcoholic, partially frozen carbonated beverages dispensed for immediate human consumption are carbonated beverages.

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.

NATURE OF ACTION:

A syrup manufacturer protests a TI&E letter finding its products were subject to carbonated beverage tax.¹

FACTS:

M. Pree, A.L.J. -- ... (taxpayer) manufactures a concentrated liquid syrup, which it sells to Washington bottlers, who resell the syrup to retail outlets. The retail outlets use a special dispenser, which combines the syrup with filtered water and carbon dioxide. The dispenser exudes the mixture (referred to as frozen carbonated beverages or FCBs) at temperatures between -4.4° C and -2.2° C. The retailer sells the FCBs to consumers for immediate consumption.

The taxpayer advised its bottlers that it would quit collecting syrup tax (Chapter 82.64 RCW) from them because it determined, the tax did not apply to syrup used to produce FCBs.² One of

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

² While the liquid concentrate used to produce soft drinks may be the same as the syrup used to produce FCBs, the taxpayer indicates it can track and distinguish the taxable sales of syrup for soft drinks, and the syrup used for FCBs, which it contends are not taxable.

the bottlers wrote the Department of Revenue's Taxpayer Services Taxpayer Information and Education Section (TI&E) inquiring whether the syrup tax was applicable. TI&E advised the bottler to pay the tax. The taxpayer appealed to this office.

The taxpayer contends the syrup is not subject to the carbonated beverage tax, because the tax applies to syrups used only to produce liquid beverages. According to the taxpayer, FCBs are frozen, and not "liquid beverages." The taxpayer states, syrup subject to the tax is added to carbonated water to produce a carbonated beverage, which is statutorily defined as a "liquid." The taxpayer asserts the FCBs do not behave as liquids, and therefore, are not liquids. Because the syrup is not used to produce a liquid, the taxpayer reasons, the syrup is not subject to tax.

TI&E stated the FCBs are "carbonated beverages" for the purpose of applying the tax. Regarding the FCBs' physical characteristics, TI&E stated:

They are not sold in a block of ice or cubes of ice. Rather, they are a mixture of finely ground ice, water, flavoring and carbonation that can be poured into a cup and drawn through a straw. The Department believes that such a concoction falls within the "ordinary meaning" of the term "carbonated beverage."

The taxpayer states it markets the FCBs as frozen products, not in competition with soft drinks, but with desserts like ice cream and frozen yogurt. We note grocery stores stock frozen products, which use the same registered names as the FCBs at issue, in freezers with ice cream and frozen yogurt. Even though these frozen products use the same registered names, they are physically different from FCBs.³ Unlike FCBs, these packaged products stocked in the freezer section, do not flow, but are frozen "hard," and not carbonated. The FCB dispensers we observed⁴ were located in space adjacent to the soft drink dispensers.

The FCBs flow from the dispenser into a cup, and can create a dome⁵ over the rim of the cup.⁶ The taxpayer states that once the FCBs are properly dispensed into the cup, they will not flow out of the container, even when the cup is held upside down.⁷ According to the taxpayer, the FCBs are dispensed at a temperature between -4.4°C and -2.2°C . If the FCB is allowed to melt, it loses its carbonation, tastes diluted due to the melted ice, and is no longer desirable.

³ We also are not aware of any tax issue under Chapter 82.64 RCW regarding these products.

⁴ The taxpayer suggested we visit some retail establishments offering FCBs, and make direct observations of the FCBs. The retail outlet closest to our office, which offered FCBs placed the FCB dispenser adjacent to the soft drink dispensers, and listed the prices on the same display with soft drink prices. Other products physically separated the freezers and dispensers for ice cream and frozen yogurt from the FCB dispenser.

⁵ The taxpayer's petition states carbon dioxide expands lifting the frozen syrup surrounding ice crystals creating the desired dome in the cup.

⁶ The FCBs are prepared and dispensed using specifications for the ratio of syrup to water, over-run or expansion due to carbon dioxide, temperature and other specifications. The specifications for FCBs do not vary dependent upon the outlet purchasing the syrup.

⁷ We were not confident we "properly" dispensed the product, and the attendant did not encourage us to hold the cup upside down. The taxpayer also offers as an exhibit, a picture of a special "spoonstraw," to demonstrate that FCBs may not be ingested like normal liquids, for which an ordinary straw would suffice.

A technology product manager employed by the taxpayer, who holds a B.S. in chemistry, responded to specific questions regarding the characteristics of the FCBs. When asked if the FCBs were partially frozen,⁸ she preferred the description “primarily frozen,” explaining microscopically, some liquids, mostly flavors were present surrounded by frozen water (ice). [She stated] FCBs are comprised mostly of frozen components, but acknowledged there is an element of liquid. When asked whether the carbon dioxide was suspended or dissolved in the liquid, she indicated it existed in the gaseous state as bubbles surrounding the ice particles. After sitting for a minute, the top of the cone may sink somewhat from the loss of gas.

ISSUE:

Were the FCBs derived from the taxpayer’s syrup a carbonated beverage?

DISCUSSION:

The carbonated beverage tax is imposed upon the sale of syrup sold in Washington. RCW 82.64.020. “Syrup” is statutorily defined as a concentrated liquid, which is added to water to produce a carbonated beverage. RCW 82.64.010(3). There is no dispute that the taxpayer’s syrup is a concentrated liquid (it is) or that it is added to water. We must only determine whether it produces a carbonated beverage. RCW 82.64.010(1) defines “Carbonated beverage” as:

“Carbonated beverage” has its ordinary meaning and includes any nonalcoholic liquid intended for human consumption which contains carbon dioxide, whether carbonation is obtained by natural or artificial means.

This definitional section first incorporates the general ordinary meaning of “carbonated beverage,” then as an inclusive subset, provides a specific description, which we will analyze first. If the FCBs fit this specific description, they would be “carbonated beverages” under Chapter 82.64 RCW.

We can break the statutory clause, “includes any nonalcoholic liquid intended for human consumption which contains carbon dioxide, whether carbonation is obtained by natural or artificial means” into the following four requirements:

1. nonalcoholic;
2. liquid;
3. intended for human consumption; and

⁸ Comments at a couple of Internet web sites suggested a liquid component of the products. See <http://www.duke.edu/~cam8/ICEE/> and <http://www.cs.buffalo.edu/~agianni/Slurpees.html>.

4. which contains carbon dioxide, whether carbonation is obtained by natural or artificial means.

There is no dispute; the taxpayer's FCBs meet requirements 1, 3, and 4. The FCBs are nonalcoholic. They are intended for human consumption. They contain carbonation (obtained by artificial means). The second requirement, whether they are liquid is disputed. The word "any" means every product meeting all four requirements falls within the definition of "carbonated beverage."

The taxpayer offers the following definition of "liquid" from *Webster's New Collegiate Dictionary*:

(F)lowing freely like water. . . neither solid nor gaseous: characterized by free movement of the constituent molecules among themselves without the tendency to separate.

In contrast, the taxpayer offers the following definitions from the same source for "frozen" and "freeze":

To become congealed into ice by cold. . . to solidify as a result of abstraction of heat. . . . to convert from a liquid to a solid.

The taxpayer asserts the FCBs are solid, not liquid.⁹ The taxpayer's employee characterizes them as "primarily frozen," but acknowledged some liquids, mostly flavors existed in the FCBs. In other words, the FCBs are not entirely solid. We agree they also contain "frozen water," which we will refer to as "ice."

Ice exists in many forms as blocks, cubes, crushed ice, or even snow. Ice is typically added to many liquid beverages. The proportion of ice to liquid does not change the character of the beverage. Whether "partially frozen" or "primarily frozen," the beverage is partially liquid. If a desired component of the beverage remains in a liquid form, we consider it liquid.

The Department does not limit its definition to liquids such as soft drinks. The Department's Rule 255 (WAC 458-20-255) repeats the statutory definition in subsection (b) and elaborates:

(b) "Carbonated beverage" has its ordinary meaning and includes any nonalcoholic liquid intended for human consumption which contains carbon dioxide.

(i) Thus, "carbonated beverage" includes but is not limited to soft drinks, "soda pop," mineral waters, seltzers, fruit juices, or any other nonalcoholic beverages, including carbonated

⁹ During the hearing, we briefly discussed the FCBs' "flowing" characteristic. The taxpayer noted sand flows somewhat like its product, or can be poured. This property does not mean sand is a liquid. Flowing sand remains a solid. Perhaps the distinction is more technical. For instance we understand glass appears solid, but in glass there is "free movement of the constituent molecules among themselves without the tendency to separate." The taxpayer's technical responses to our specific questions reveal the FCBs contain some liquids with solid ice particles. We will analyze the issue on that basis.

waters, which are produced for human consumption and which contain any amount of carbon dioxide.

(ii) However, "carbonated beverage" does not include bromides or other carbonated liquids commonly sold as pharmaceuticals.

As we first noted, the statutory definition of "carbonated beverages" first incorporates the broad ordinary meaning, then includes a specific subset within that definition. We note subsection (b)(i) of Rule 255 includes "any other nonalcoholic beverages" without the modifier "liquid."

With respect to the use of the word "includes" in both Rule 255(b) and RCW 82.64.010(1), it is useful to observe that "includes" when appearing in a statutory definition is construed as a term of enlargement, not limitation. See *Queets Band of Indians v. State*, 102 Wn.2d 1, 4, 682 P.2d 909 (1984). See Also N. Singer, 2A Sutherland Statutory Construction, § 47.07 (6th ed. 2000). Although a statutory definition may declare what it includes, other items may also be includable though not specifically enumerated. Det. No. 87-143, 3 WTD 91, 97 (1987).

We also note, our Appellate Court does not necessarily¹⁰ include liquid as a statutory requirement:

The trial court's determination that Martinelli's sparkling 100% fruit juices (1) are nonalcoholic, (2) intended for human consumption, and (3) contain carbon dioxide, under the statutory definition and, therefore, are subject to taxation under RCW 82.64, is a correct application of the statute.

Martinelli v. Department of Rev., 80 Wn.App. 930, 936, 912 P.2. 521 (1993). Therefore, we do not necessarily consider the ordinary definition of "carbonated beverage" to require the beverage be completely liquid. However, we do consider the FCBs liquids, falling within the specific statutory clause following "and includes" as well as the statutory incorporation of the ordinary meaning of carbonated beverage.

We conclude nonalcoholic, partially frozen carbonated beverages dispensed for immediate human consumption are carbonated beverages. Sales of liquid concentrate syrups used to produce FCBs are, therefore, subject to tax under Chapter 82.64 RCW.

DECISION AND DISPOSITION:

We deny the taxpayer's petition.

Dated this 15th day of June, 2000.

¹⁰ The decision contains other references that both the Department and Martinelli acknowledged the juices at issue were liquids. However, we note in this excerpt, the Court also did not consider it necessary to include a "liquid" requirement to fall under the statutory definition.