

Cite as Det. No. 00-046, 19 WTD 971 (2000)

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>
Assessment and Refund of)	
)	No. 00-046
)	
...)	Registration No. . . .
)	FY. . . /Audit No. . . .

- [1] RCW 82.04.050: RETAIL SALES TAX – LIQUID NITROGEN – CHERRIES – ASPARAGUS – DECAY. Sales of liquid nitrogen applied directly on post-harvest cherries to prevent decay are not retail sales. Sales of liquid nitrogen applied in a similar manner to asparagus are retail sales.

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 company that freezes agricultural products by applying liquid nitrogen directly on the produce, requests a refund of retail sales tax assessed on the nitrogen.¹

FACTS:

M. Pree, A.L.J. -- . . ., Inc. (taxpayer) purchases agricultural products from farmers, freezes them, then sells them inside and outside Washington. The taxpayer applies liquid nitrogen directly on cherries and asparagus to freeze them. The taxpayer did not pay retail sales tax on its purchases of liquid nitrogen.

The Department of Revenue's Audit Division (Audit) reviewed the taxpayer's books and records for the period January 1, 1995 through June 30, 1998. As a result, Audit issued the above referenced assessment, which the taxpayer paid, but petitioned this office for correction of two schedules. In response to the petition, Audit agreed to revise one schedule (Schedule 8), but not Schedule 7, which assessed deferred sales or use tax on liquid nitrogen. Therefore, we will only discuss the liquid nitrogen issue.

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

The taxpayer purchased fresh produce from farmers. Its employees placed asparagus and cherries on a conveyor, which carried them through a pool of liquid nitrogen, then under a liquid nitrogen sprayer. This process immediately froze the asparagus and cherries, which prevented growth of fungus, mold, or decay. The taxpayer then boxed the frozen asparagus and cherries, which the taxpayer stored in its freezer. The taxpayer sold these products to its customers in the frozen state throughout the year.

Audit notes the taxpayer was not a farmer. The taxpayer agrees, it was neither a farmer, nor an agent for farmers. Rather, the taxpayer purchased post-harvest produce, processed it, then sold it. Audit explains fresh fruit and packing plants, performing washing and packing services for growers, are exempt from business and occupation tax under RCW 82.04.4287 and WAC 458-20-214. Because the taxpayer was not a farmer, and because it purchased the produce from the growers (and therefore, did not process it as their agent); Audit states the taxpayer would not qualify for the exemption.

The taxpayer responds that it does not rely on the authority cited by Audit as its basis for the exemption. The taxpayer cites RCW 82.04.050(8), which excepts from the definition of retail sale:

(8) The term shall also not include sales of chemical sprays or washes to persons for the purpose of postharvest treatment of fruit for the prevention of scald, fungus, mold, or decay, nor shall it include sales of feed, seed, seedlings, fertilizer, agents for enhanced pollination including insects such as bees, and spray materials to: (a) Persons who participate in the federal conservation reserve program, the environmental quality incentives program, the wetlands reserve program, and the wildlife habitat incentives program, or their successors administered by the United States department of agriculture; (b) farmers for the purpose of producing for sale any agricultural product; and (c) farmers acting under cooperative habitat development or access contracts with an organization exempt from federal income tax under 26 U.S.C. Sec. 501(c)(3) or the Washington state department of fish and wildlife to produce or improve wildlife habitat on land that the farmer owns or leases.

(Emphasis added.) The taxpayer contends under the portion of the statute highlighted above, the exception applies to sales to *persons*, without limiting application of the first clause to farmers only.

Audit also found the use of liquid nitrogen was primarily to change the form of the product to maintain its quality and extend product life. Audit states, "The fact that this keeps scald, mold, and fungus from developing is secondary." The taxpayer responds that it froze the cherries and asparagus to prevent decay. Unfrozen, these products could only be marketed for a short period after harvest, before they would spoil. Therefore, the taxpayer states it treated the produce with liquid nitrogen to retard and prevent fungus, mold, and decay.

ISSUE:

Were the taxpayer's purchases of liquid nitrogen, in which the taxpayer dipped and sprayed cherries and asparagus, retail sales?

DISCUSSION:

The taxpayer relies on a single exception to the definition of retail sale, which we highlighted above. The taxpayer acknowledges it is not a farmer, noting the exception highlighted above applies to *persons*, not just farmers. We note the exceptions in subsection (b) and (c) apply only to farmers, while the exception in subsection (a) applies to persons. The taxpayer relies on the exception granted by the language preceding the word "nor."

The language, "sales of chemical sprays or washes to persons for the purpose of postharvest treatment of fruit for the prevention of scald, fungus, mold, or decay" has been an exception to the definition of retail sale since 1967. *See* Laws of 1967 Ex. Sess. Ch. 149. Additional agricultural exceptions were added in 1988, 1993, and 1997. In 1988 "nor shall it" was deleted, and a second sentence inserted adding an exception for participants in the federal conservation reserve program.² *See* Laws of 1988, Ch. 253, sec. 1. In 1993, the language, "agents for enhanced pollination including insects such as bees," was added. But most notably, the word "farmers" was substituted for "persons" regarding "any agricultural product," while the word "persons" remained in the clause we highlighted. *See* Laws of 1993, 1st Sp. Sess., Ch. 25, sec. 301. In 1997, the clause we highlighted was moved to the beginning of the subsection, and the wildlife habitat language added. *See* Laws of 1997, Ch. 127, Sec. 1. It appears each amendment was intended to add a distinct exception to the definition of retail sale. It is also evident, particularly with the 1993 amendment, the drafters realized the distinction between "farmers" and "persons." Realizing this distinction, we believe they intended to have different terms applied to different exceptions.

Webster's Third International Dictionary Unabridged (1993) notes "nor" may be use as a function word to introduce the second and each following member of a series of two or more items each of which is negated. In the context of RCW 82.04.050(8) the clause preceding "nor" offers the first exception from the definition of retail sale, with "nor" introducing the second item as (a) with the series continuing through (c). Each negates distinct sales from the definition of retail sale. The taxpayer asks we consider liquid nitrogen negated from the definition of "retail sale" under the authority of the first (highlighted) clause only.

The first clause applies to persons, and is not restricted for farmers. If the legislature uses certain statutory language in one instance (persons) and different language in another (farmers), there is a difference in legislative intent. *United Parcel Service, Inc. v. Department of Rev.*, 102 Wn.2d 355, 687 P.2d 186, (1984). Use of "persons" meant to apply the broader statutory definition to

² In 1988, the applicable subsection was numbered (6). In 1993, and during the audit period, it was subsection (7). It is currently numbered subsection (8) due to unrelated changes to RCW 82.04.050, which are not relevant to the issue at hand.

the first portion as well as (a), while (b) and (c) were only meant to apply to farmers. Therefore, it was not necessary for the taxpayer to be a farmer for the exception to apply.

Breaking down the highlighted portion of 82.04.050(8), sales excepted from the definition of retail sales must:

1. Be chemical sprays or washes;
2. to persons;
3. for the purpose of postharvest treatment;
4. of fruit; and
5. for the prevention of scald, fungus, mold, or decay.

The taxpayer dips the cherries and asparagus in the liquid nitrogen, a chemical, then sprays liquid nitrogen directly on the cherries and asparagus. Previously, we determined pear float, a floatation salt with anti-fungal properties, added to a water solution in which pears were dipped, qualified as a chemical spray or wash. Det. No. 90-386, 10 WTD 336 (1990).³ We find the liquid nitrogen used in this manner to be a chemical spray or wash.

The taxpayer, a corporation, is a person under RCW 82.04.030. We have previously granted this exception to a cold storage business in Det. No. 91-305S, 11 WTD 281 (1991). As discussed above, the taxpayer need not be a farmer, only a person.

The farmers harvested the cherries and asparagus, then sold them to the taxpayer. The taxpayer purchased and used the liquid nitrogen for post-harvest treatment.

We note the legislature also referred to “fruit” in the first portion of RCW 82.04.050(8), and “any agricultural product” in (b). As with the distinction between “farmer” and “person” previously discussed, we believe the different terms were meant to be applied differently. *United Parcel Service, Inc. v. Department of Rev., Supra.* We find the legislature intended the first portion to apply to fruit only, while (b) offered a broader application for “any agricultural product.”

Cherries are a soft tree fruit. RCW 15.28.010(6). Asparagus is a vegetable, not a fruit. Cherries have different standards, grades, and regulations from asparagus.⁴ Sales of chemical sprays or washes for the purpose of post-harvest treatment of asparagus, a vegetable not a fruit, would not be excepted from the definition of “retail sale” under RCW 82.04.050(8). Only the sales of chemical sprays or washes for the treatment of cherries, a fruit, could be excepted under this clause from the definition of retail sale. Liquid nitrogen used on cherries will qualify if the other requirements of RCW 82.04.050(8) are met.

³ This determination was overruled in part by Det. No. 91-305S, 11 WTD 281 (1991) regarding the taxability of hydrated lime. Det. No. 91-305S did not overrule the taxability of pear float products.

⁴ Compare Chapter 16-409 WAC with Chapter 16-412 WAC.

The taxpayer states it dipped and sprayed the cherries with liquid nitrogen to retard and prevent fungus, mold, and decay. Freezing the cherries prevented decay, and allowed the taxpayer to market them throughout the year. Audit contends the purpose of the liquid nitrogen is to change the form of the product by freezing it,⁵ and preventing scald, mold, and fungus from developing is secondary.

In Det. No. 90-386, we recognized pear float, which had a purpose of raising the density of water to allow pears to float for efficient handling, also had anti-fungal properties. We allowed the exception based upon pear float's anti-fungal properties, but did not discuss the relative importance of each purpose.

We understand freezing cherries prevents them from decaying. The taxpayer changes the form of the cherries from fresh to frozen to prevent decay. While arguably, the nitrogen could be "primarily" to change the form, and "secondarily" to prevent decay, we need not make that distinction or even analyze how freezing prevents decay. We only note Audit acknowledged direct application of liquid nitrogen does prevent decay, and the taxpayer purchased the liquid nitrogen "secondarily" for that purpose. The "purpose" requirement of RCW 82.04.050(8) does not require the sole or even primary purpose of the chemical spray or wash be to prevent scald, mold, fungus, or decay.

The Washington Supreme Court analyzed a different subsection of RCW 82.04.050, which excepted from the retail sale definition property purchased, for the purpose of consuming it in the production of a new article of tangible personal property of which the original property becomes an ingredient or component. The Court found:

RCW 82.04.050 does not require that the tangible personal property so purchased be acquired primarily for the purpose of such consumption in order to avoid taxation as a "retail sale".

RCW 82.04.050 makes it clear that a sale to one who purchases tangible personal property for the purpose of consuming it in the production of a NEW article of tangible personal property of which the original property becomes an ingredient or component is not a "retail sale" for taxation purposes. RCW 82.04.050 does not require that the tangible personal property so purchased be acquired primarily for the purpose of such consumption in order to avoid taxation as a "retail sale". In contrast, the purchase of chemicals used in processing escapes taxation only if the primary purpose of such chemical is to create a reaction. In short, in determining the applicability of the tax, there is no "primary purpose test" required for property that becomes an ingredient or component of the new article.

⁵ Freezing fresh, edible food changes its form. See *Stokely-Van Camp, Inc. v. State*, 50 Wn.2d 492, 312 P.2d 816 (1957)

Lone Star Industries V. Department of Rev., 97 Wn.2d 630, 634-5, 647 P.2d 1013: (1982). The taxpayer acquired the liquid nitrogen for the purpose of preventing mold on the cherries.

Sales of liquid nitrogen applied directly on post-harvest cherries to prevent decay are not retail sales. Sales of liquid nitrogen applied in a similar manner to asparagus are retail sales.

DECISION AND DISPOSITION:

We remand the assessment to Audit. Within sixty (60) days of this determination, the taxpayer must make records available to Audit to establish the portion of liquid nitrogen purchased for direct application on cherries to prevent decay. Audit will remove the tax on purchases of liquid nitrogen, which the taxpayer establishes was used on directly on the cherries, from the assessment.

Dated this 23rd day of March, 2000.