

Cite as 9 WTD 286-83

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

In the Matter of the Petition)	<u>D</u> <u>E</u> <u>T</u> <u>E</u> <u>R</u> <u>M</u> <u>I</u> <u>N</u> <u>A</u> <u>T</u> <u>I</u> <u>O</u>
<u>N</u>	
For Correction of Assessment)	
of)	No. 90-200
)	
. . .)	Registration No. . . .
)	
)	Notice of Balance Due

[1] RULE 243: LITTER TAX -- EXEMPTION -- SALES OF BREWED COFFEE -- INDOOR CONSUMPTION -- ETB 445.04.243. Sales of brewed coffee by retailers solely for consumption indoors on the seller's premises are exempt from the annual litter tax. ETB 445.84.243. Wholesale and retail sales of coffee as a grocery item are subject to the litter tax.

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:

Petition protesting assessment of the litter tax on the basis that the coffee sold is consumed on the premises.

FACTS AND ISSUES:

Krebs, A.L.J. -- [The taxpayer] is engaged in the business of selling coffee. The taxpayer also sells brewed coffee for on premises consumption.

The Department of Revenue (Department) examined the taxpayer's filed December tax returns for the years of . . . through . . . and assessed annual litter taxes totaling \$ The Department sent a Notice of Balance Due for that amount to the taxpayer and the amount remains due.

The taxpayer claims exemption from the litter tax for the reason that the brewed coffee it sells is consumed on the premises and no paper cups are used. The taxpayer asserts that it does not create any litter in the operation of its business.

DISCUSSION:

The annual litter tax is levied upon manufacturers, wholesalers and retailers on their sales of certain products in thirteen categories. Of those categories, there are two which apply to the taxpayer's business activity of selling coffee: (1) food for human or pet consumption and (2) groceries, that is, food for off premises consumption. WAC 458-20-243 and RCW 70.93.130

[1] Excise Tax Bulletin 445.04.243 (ETB 445) in pertinent part states:

The department has concluded that the litter tax does not apply to

1. sales of food and beverages
2. by retailers
3. which are solely for consumption
 - a. indoors
 - b. on the seller's premises.

In this case, the taxpayer makes retail sales of brewed coffee in a manner (no paper cups are used) so that it is able to and does control and limit consumption solely indoors on its premises. Accordingly, such sales are exempt from the litter tax.

However, our examination of the taxpayer's filed periodic tax returns discloses that the taxpayer reported wholesale sales and retail sales of coffee; and less than five percent of the retail sales were reported as subject to sales tax which leads us to believe that at least 95 percent of the coffee sold at retail was sold as a non-sales taxable grocery item for off premises use. Thus, at least 95 percent of the sales are subject to the litter tax. This means that the assessed litter tax of \$. . . should be reduced by five percent or \$. . . (. . .) to \$

As to the taxpayer's assertion that the operation of its business does not create litter, it must be recognized that

the statutes levy the tax on the sales of statutorily designated products by manufacturers, wholesalers and retailers. The sale is the incident of the tax, not the creation of litter.

DECISION AND DISPOSITION:

The taxpayer's petition is granted in part and denied in part as indicated in the Determination.

DATED this 8th day of May 1990.