

Cite as Det. No. 14-0001, 35 WTD 263 (2016)

BEFORE THE APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition for Refund of)	<u>D E T E R M I N A T I O N</u>
)	
)	No. 14-0001
...)	
)	Registration No. . . .
)	

[1] RCW 82.04.050(1)(a)(i), 82.04.060(1); WAC 458-20-115: PACKING MATERIALS PURCHASED FOR RESALE. Pallet rentals where pallet vendor retains ownership of pallets are not sales of packing materials purchased for resale.

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.

Sohng, A.L.J. – Beverage manufacturer petitions for refund of sales tax on its rental of pallets, on the grounds that they were purchased for resale as packing materials under WAC 458-20-115. The petition is denied.¹

ISSUE

Is a manufacturer’s rental of pallets used to ship merchandise to its customers subject to retail sales and/or use tax under WAC 458-20-115 when the pallet vendor retains ownership of the pallets?

FINDINGS OF FACT

[Taxpayer] is a manufacturer of bottled water and other beverages. Taxpayer requested a refund of sales taxes it paid on the rental of pallets for the period January 1, 2008 through December 31, 2011, in the amount of \$. . . . The Department of Revenue’s (the “Department”) Audit Division denied the refund claim on the grounds that the pallets did not qualify as packing materials purchased for resale under WAC 458-20-115. Taxpayer appeals the Audit Division’s refund denial.

Taxpayer uses pallets to ship products to its customers, most of which are large retailers. Taxpayer rents the pallets from . . . a global pallet vendor [(Vendor)]. Taxpayer shrink- wraps its bottled beverages to the pallets, which are then delivered to retailers. [Vendor] charges Taxpayer an issue fee of approximately \$. . . for each pallet.² Pallets rented from [Vendor] are blue and

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

² The issue fee is adjusted slightly from this figure, based on the volume of pallets Taxpayer uses.

bear the stamp “Property of [Vendor].” The cost of the pallets is not separately itemized on Taxpayer’s sales invoices to retailers. Taxpayer states that its pallet costs are built into its pricing structure for the finished product it delivers to its customers.

Most of Taxpayer’s customers participate in [Vendor’s] pallet pooling program, which tracks incoming and outgoing pallets. Once the original product load is empty, the retailer returns the pallets to the nearest [Vendor] service depot, where they are inspected, repaired (if necessary), and reissued. Retailers can also arrange for [Vendor] to collect the empty pallets, in which case [Vendor] charges Taxpayer a small inbound movement fee. Taxpayer exercises no control of the pallets once they leave Taxpayer’s facility and is not responsible for returning pallets to [Vendor] once they have been delivered to a customer location.

Taxpayer does not require its customers to return the pallets to Taxpayer or to participate in [Vendor]’s pooling program. Participating retailers have a contract with [Vendor]. Because participating retailers undertake certain contractual obligations, [Vendor] generally doesn’t charge Taxpayer a transfer fee when Taxpayer ships goods to such participating retailers. [Vendor] must approve all shipments to non-participating retailers, for which [Vendor] charges Taxpayer a transfer fee (ranging from \$. . . to \$. . .). If a retailer fails to return a pallet, [Vendor] charges Taxpayer a lost pallet fee of \$ Taxpayer states that it does not typically bill the retailer for this lost pallet fee, but in some cases, it does. Taxpayer does not collect deposits for the pallets from its customers and does not provide credit to customers who return the pallets to [Vendor].

Taxpayer maintains that [Vendor] retains title to the pallets throughout this entire chain of events, including periods when the pallets are in the possession of Taxpayer or retailers: “For pallets that [Vendor] leases, [Vendor] retains title to the pallets at all times, as [Taxpayer] never has title of these pallets.”³ The Hire Agreement that governs the pallet rental between [Vendor] and Taxpayer specifically addresses ownership of the pallets:

6. OWNERSHIP OF EQUIPMENT

- (a) [Vendor] never sells or transfers ownership of its Equipment. Customer acknowledges and agrees that each item of Equipment has special value to [Vendor] and that [Vendor] repairs, maintains, handles, and otherwise administers the circulation of all Equipment as part of a pool.
- (b) Customer acknowledges and agrees that . . . [Vendor] remains the owner of the Equipment at all times. Neither Customer nor any other person is entitled to purchase or sell the Equipment, or use, dispose of, or otherwise deal with the Equipment in any way that is inconsistent with [Vendor]’s ownership of the Equipment or the terms of this Agreement. . . .
- (c) CUSTOMER HEREBY EXPRESSLY WAIVES ANY . . . LEGAL OR EQUITAQBLE CLAIMS OF TITLE TO THE EQUIPMENT.

³ Taxpayer’s Reply to Audit Division’s Response, at 1 (Mar. 20, 2013).

ANALYSIS

Washington imposes retail sales tax on each retail sale in this state. RCW 82.08.020. However, a retail sale does not include "purchases for the purpose of resale as tangible personal property in the regular course of business without intervening use by such person" (i.e., a wholesale sale). RCW 82.04.050(1)(a)(i). WAC 458-20-115 ("Rule 115") is the administrative rule that explains the taxation of packing materials and containers. It provides:

(3) Business and occupation tax.

- (a) Sales of packing materials to persons who sell tangible personal property contained in or protected by packing materials are sales for resale and subject to tax under the wholesaling classification. Sellers must obtain resale certificates for sales made before January 1, 2010, or reseller permits for sales made on or after January 1, 2010, from purchasers to document the wholesale nature of any sale as provided in WAC 458-20-102A (Resale certificates) and WAC 458-20-102 (Reseller permits). . . .

(Emphasis added.) "Packing materials" is defined as "all boxes, crates, bottles, cans, bags, drums, cartons, wrapping papers, cellophane, twines, gummed tapes, wire, bands, excelsior, waste paper, and all other materials in which tangible personal property may be contained or protected within a container, for transportation or delivery to a purchaser." Rule 115(2). The Department has consistently held that pallets are "packing materials and taxable in the same manner." Det. No. 90-302, 10 WTD 101, 104 (1990); Det. No. 88-440, 7 WTD 43(1988).

Thus, under Rule 115(3)(a), sales of packing materials, such as pallets, to persons who sell tangible personal property contained therein, are sales for resale and subject to wholesaling B&O tax. The statutory authority for this rule provision is RCW 82.04.050(1)(a)(i), which provides wholesale treatment for "purchases for the purpose of resale as tangible personal property in the regular course of business without intervening use by such person." Taxpayer argues that its rental of pallets meets the requirements of Rule 115(3)(a) for wholesale treatment. However, Taxpayer overlooks the underlying statutory requirement contained in RCW 82.04.050(1)(a)(i) that a wholesale purchase must be "for the purpose of resale." As the Hire Agreement makes clear (as well as Taxpayer's own admission), [Vendor], not Taxpayer, is the owner of the pallets. Because Taxpayer does not own the pallets, it cannot, under the terms of the contract, "resell" (or have the purpose of reselling) them to its own customers. The Hire Agreement expressly prohibits Taxpayer from selling the pallets. Thus, Taxpayer lacks the authority to resell them. The pallet rental is not a wholesale transaction under RCW 82.04.050(1)(a)(i).

Having determined that the pallet rental is not a wholesale transaction, the next question is whether the pallet rental is a *retail* transaction.⁴ Under RCW 82.04.050(1)(a), the term "retail sale" generally includes the sale of tangible personal property. RCW 82.04.050(4)(a) provides that "retail sale" includes the "renting or leasing of tangible personal property to consumers." The transaction between [Vendor] and Taxpayer is clearly a rental, as evidenced by their written

⁴ [Under RCW 82.04.060(1), a "wholesale sale" is specifically defined as "[a]ny sale, which is *not* a sale at retail . . ." (Emphasis added.). The sales at issue are not wholesale sales because the rentals are retail sales as described below.]

contract. RCW 82.08.010(7) defines “tangible personal property” as “personal property that can be seen, weighed, measured, felt, or touched, or that is in any other manner perceptible to the senses.” Here, the pallets are “tangible personal property” because they can be seen, weighed, measured, felt, and touched. The term “consumer” is defined as: “Any person who purchases, acquires, owns, holds, or uses any article of tangible personal property irrespective of the nature of the person's business. . . .” RCW 82.04.190. Taxpayer acquires and uses the pallets (which are tangible personal property) to ship its products to its customers. Taxpayer is a consumer that rents tangible personal property. Thus, Taxpayer’s rental of pallets from [Vendor] is a retail sale subject to retail sales tax.RCW 82.08.020.

DECISION AND DISPOSITION

We deny the petition.

Dated this 2nd day of January, 2014.