

Cite as 10 WTD 336 (1990).

This determination has been overruled in part by Det.
No. 91-305S, 11 WTD 281 (1991).

APPEALS DIVISION

BEFORE THE INTERPRETATION AND
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition) D E T E R M I N A T I O N
For Correction of Assessment of)
) No. 90-386
)
 . . .) Registration No. . . .
) . . ./Audit No. . . .
)

- [1] RULES 122 AND 178, RCW 82.04.050 (6), RCW 15.54.272: USE TAX EXEMPTION -- COMMERCIAL FERTILIZERS. The legislature intended to exempt from sales/use tax all recognized commercial fertilizers which are purchased and first used as such by agricultural producers covered by RCW 82.04.330. Rule 122 is construed to exempt fertilizers applied by spraying plants directly as well as those fertilizers added to the soil.
- [2] RULE 122, RCW 82.04.050 (6), RCW 82.12.010 (2), RCW 15.54.272: USE TAX -- INTERVENING USE. When taxpayer first uses a substance for purposes other than one which is tax exempt, such use is intervening use and negates the exemption. The use tax test is first use, not primary use. An exemption in a tax statute will be strictly construed in favor of taxation. Accord: Det. 87-298, 4 WTD 87 (1987), Budget Rent-a-Car vs. Dept. of Rev., 81 Wn.2d 171, 174 (1972).
- [3] RCW 82.040.50 (6): USE TAX EXEMPTION -- CHEMICAL SPRAYS OR WASH: Flotation salts such as pear float/sodium silicate prevent fungal decay of harvested fruit and thus are exempt from sales/use tax for persons who purchase them for post-harvest treatment of fruit.

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

De Luca, A.L.J. -- The taxpayer petitioned for a correction of an assessment of use taxes on fertilizers and a chemical wash which it had purchased.

FACTS

The taxpayer is a commercial tree-fruit grower located in Washington. The taxpayer was audited for the period . . . , 1986 through . . . , 1989. The Audit Division assessed sales tax, use tax, as well as business and occupation (B & O) tax, plus interest, totalling \$ The taxpayer paid \$ It protests the balance of \$. . . in use taxes assessed against its purchases of hydrated lime, calcium chloride (a/k/a link calcium and mora leaf calcium), and sodium silicate (pear float). The products are fertilizers and/or decay retardants.

The three types of chemicals serve separate functions. According to the audit report, the hydrated lime is used in cold storage to keep fruit fresh for longer periods by reducing the amount of carbon dioxide in the air. Hydrated lime is also used by the taxpayer as a fertilizer applied to the soil. The Audit Division held because the hydrated lime was first used to reduce the CO2 levels in cold storage then used to fertilize soil, the use tax exemption did not apply.

Calcium chloride is a fertilizer which is sprayed directly onto tree leaves, but is not added to the soil. The nutrient is absorbed by the trees and fruits. The audit division relied on prior decisions by the Department of Revenue and denied the exemption because the chemical was not added directly to the soil.

Finally, pears are frequently brought from harvest bins to packing lines in water solutions to minimize fruit bruising during handling. Pear float is a flotation salt which raises the density of a water solution thereby allowing pears to float and be handled efficiently. Pear float also inhibits decay fungi. The auditor's detail of differences and instructions to the taxpayer did not discuss pear float or the reason the exemption for it was denied.

ISSUES

Is the taxpayer entitled to a sales/use tax exemption if the fertilizer calcium chloride (or its other trade names) is applied by spraying the leaves of fruit trees rather than added to the soil to increase productivity?

Is the taxpayer entitled to a sales/use tax exemption for hydrated lime when the material is used successively as an inhibitor of CO₂ in cold storage and as a soil fertilizer?

Is the taxpayer entitled to a sales/use tax exemption for the use of pear float?

TAXPAYER'S EXCEPTIONS

The taxpayer argues calcium chloride is a fertilizer which adds nutrients to trees to increase their fruit production. The effect is the same that soil fertilizers are intended to have. In short, the taxpayer argues the Department's long-standing interpretation of WAC 458-20-122 (Rule 122) lags behind industry practices. The taxpayer submitted a letter and a publication on spray fertilizers from a tree fruit extension agent of Washington State University. The extension agent states:

Regarding your question on the definition of fertilizer in WAC 458-20-122(1)(c), it appears that wording leaves out many uses of plant mineral nutrients which are more efficiently utilized when applied to the plant directly. The tree fruit production in Washington routinely uses foliar plant nutrients to improve orchard productivity and many of these can not be effectively applied in any other way.

Enclosed is a copy of nutrient spray recommendations from the 1990 Spray Guide for Tree Fruits in Eastern Washington (EB0419). From this you can see that foliar application of plant nutrients is an effective and recommended method of improving plant mineral nutrition.

The taxpayer next objects to the denial of the exemption for the use of hydrated lime. The taxpayer argues that the primary purpose of the lime is its use as a soil fertilizer. The taxpayer explained it can control CO₂ levels by using either lime or a mechanical carbon dioxide scrubber powered by electricity. The scrubber is less costly than the lime, however the taxpayer needs the lime as a fertilizer after its use in cold storage to correct a soil PH problem in its orchards.

The taxpayer explains:

If we used the mechanical scrubber for carbon dioxide control, we would still have to purchase lime as a fertilizer. Our decision to use lime rather than a mechanical scrubber then, is based on the lime's value as a fertilizer.

The taxpayer concludes that the lime's use as a fertilizer is its primary use and its value in controlling CO2 is a secondary one.

Finally, the taxpayer argues that pear float is necessary to efficiently pack pears. Moreover, the taxpayer submitted an article on flotation salts: Sugar and Potts, Flotation Materials for Pear, 7 No.2 Wash. St. U. Postharvest Pomology Newsletter, Sept. 1989, at 5-6 which explains that pear float/flotation salts have inherent anti-fungal properties.

DISCUSSION

RCW 82.12.020 imposes a use tax "for the privilege of using within this state as a consumer any article of tangible personal property purchased at retail...." Whereas, RCW 82.04.050 (6) provides a tax exemption in defining retail sales:

*** The term shall also not include sales of feed, seed, seedlings, fertilizer and spray materials ... or to persons for the purpose of producing for sale any agricultural product whatsoever, ... but only when such production and subsequent sale are exempt from tax under RCW 82.04.330, nor shall it include sales of chemical sprays or washes to persons for the purpose of post-harvest treatment of fruit for the prevention of scald, fungus, mold, or decay. (underlining ours)

RCW 82.04.330 provides an exemption from the B & O tax for agricultural growers who sell their produce or crops at wholesale.

The legislature has defined "commercial fertilizer" as:

...any substance containing one or more recognized plant nutrients and which is used for its plant nutrient content and/or which is designated for use or claimed to have value in promoting plant growth, and which shall include limes, gypsum and manipulated animal and vegetable manures. *** (underlining ours)

RCW 15.54.272. Rule 122 defines it as:

[t]he word "fertilizer" means a substance which increases the productivity of the soil by adding plant foods or nutrients which improve and stimulate plant growth.

WAC 458-20-122 (1) (c).

Finally, WAC 458-20-178 (7) (tt) exempts from the use tax "the use of ... fertilizer and spray materials by persons raising agricultural and horticultural products for sale at wholesale...."

[1] The evidence reveals that for some fertilizers the only effective way to apply them is by spraying foliage. The legislature did not restrict the definition of fertilizer only to those nutrient substances added to the soil. Clearly, the legislature intended to exempt all recognized commercial fertilizers used by agricultural producers covered by RCW 82.04.330. From now on, Rule 122 will be interpreted consistently with the broader statutory meaning of fertilizer to include foliar application as well as fertilizers added to the soil.

The next issue concerns whether the taxpayer is entitled to the use tax exemption for hydrated lime as a fertilizer if it is used first to lower CO2 levels in cold storage and subsequently is added to the soil as a fertilizer. RCW 82.12.010 (2) defines use as:

"Use," "used," "using," or "put to use" shall have their ordinary meaning, and shall mean the first act within this state by which the taxpayer takes or assumes dominion or control over the article of tangible personal property (as a consumer), and include installation, storage, withdrawal from storage, or any other act preparatory to subsequent actual use or consumption within this state; (underlining ours)

[2] The test then is the first use of the lime and not its primary use. Its initial use as a scrubber to reduce CO2 levels, rather than a fertilizer, is an intervening use. In order for the fertilizer exemption to apply, the lime must first be used as a fertilizer and not as a scrubber. An exemption in a tax statute must be strictly construed in favor of taxation. Intervening use will negate an exemption. Det. No. 87-298, 4 WTD 87 (1987), Budget Rent-a-Car vs. Dept. of Rev., 81 Wn.2d 171, 174 (1972).

[3] Finally, as quoted above, RCW 82.04.050 (6) exempts from sales/use tax the sales of chemical sprays and washes to persons for the purpose of post-harvest treatment of fruit for the prevention of scald, fungus, mold or decay. The evidence shows that pear float/sodium silicate and other flotation salts serve exactly that purpose due to their anti-fungal properties. The use tax exemption applies to the pear float.

DECISION AND DISPOSITION

The taxpayer's petition is granted in part and denied in part. The taxpayer does not owe use tax on its purchase/use of calcium chloride, link calcium, mora leaf calcium and pear float/sodium silicate when used in the production of agricultural products for wholesale. The taxpayer does owe use tax on hydrated lime because its first and intervening use is to reduce CO2 levels rather than act as a fertilizer.

DATED this 21st day of November, 1990.