

Cite as 10 WTD 101

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

In the Matter of the Petition)	<u>D E T E R M I N A T I O N</u>
For Correction of Assessment)	
and Refund of)	No. 90-302
)	
. . .)	Registration No. . . .
)	. . ./Audit No. . . .
)	

[1] RULE 115: B&O & USE AND/OR DEFERRED SALES TAX -- PALLETS
-- GENERIC -- SELLING PRICE OF PRODUCT. Separately
itemized charges for generic pallets were found to be
part of the selling price of the product sold. Pallet
purchases by the seller are for resale and not subject to
use and/or deferred sales 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.

NATURE OF ACTION:

A taxpayer protests additional taxes and interest assessed in an
audit report.

DATE OF ORIGINAL HEARING: June 2, 1988

(Conducted by Potegal, ALJ)

DATE OF SUPPLEMENTAL HEARING: July 13, 1990

(Conducted by Okimoto, ALJ)

TAXPAYER REPRESENTED BY: . . .

FACTS:

Okimoto, A.L.J. (Successor to Potegal, A.L.J.) -- [The taxpayer]
operates a cardboard container manufacturing plant in . . . ,
Washington. Department of Revenue (Department) auditors examined
the taxpayer's books and records for the period . . . through . . .
. As a result of this audit examination, Document No. . . . was
issued on . . . for additional taxes, interest and penalties in the
amount of \$ The taxpayer paid the unprotested portion of
the assessment on A subsequent post-assessment adjustment

reduced the original assessment and in addition allowed a credit for retail sales tax collected in error and refunded to their customers which resulted in a credit balance of \$ The taxpayer now protests a portion of the assessment and petitions for a refund.

TAXPAYER'S EXCEPTIONS:

Schedules XI & XIII: Tax on Pallet Charges and Pallet Purchases

In the audit report, the auditors assessed unreported B&O taxes on the amounts separately itemized on invoices as amounts charged to customers for pallets. The auditors referred to ETB 340.08.115 and concluded that even though the "customer has a right to return the pallets for credit in the same amount as the pallet charge", these charges constituted "sales of pallets and merchandise packaged thereon"¹ and were subject to tax.

In addition the auditors assessed use and/or deferred sales tax on all purchases of pallets by the taxpayer because:

[Taxpayer] was not able to segregate the purchases of pallets for which the title passed to the customer and those purchased and used in the deposit-return program (see explanation under Schedule XI).²

Apparently, because the taxpayer included a separately itemized pallet charge to some of its customers and allowed a credit if the pallets were returned, the auditors concluded that this converted the transaction from an outright sale to a refundable security deposit and return program.

The taxpayer stressed at the hearing that it has only one policy regarding pallets and that policy is an outright sale to the customer. The taxpayer stated that its intent has always been to pass title of the pallets to the customer upon delivery and that at anytime thereafter, the customer has the right to do whatever it wishes. The customer may burn it, use it, or sell it back to the taxpayer, but is under no obligation whatsoever to return the pallet to the taxpayer. If the customer returns the pallet, the taxpayer will repurchase that pallet for the same amount that it sells them for and in addition will repurchase any other generic pallets that the customer wants to sell.

¹Auditor's Detail of Differences and Instructions to Taxpayers, page 2.

²Auditor's Detail of Differences and Instructions to Taxpayers, page 4.

The taxpayer further states that its normal practice was to not separately itemize a charge for pallets, and only began the practice as a favor to individual customers who requested it. If the customer did not request separate itemization, it was not done. The taxpayer further argues that it is immaterial that a separate charge may be stated on the customer's invoice and that the critical issue is whether title to the pallets is retained by the taxpayer, or passed to the customer.

The taxpayer further emphasizes that the pallets are generic, and bear neither the taxpayer's name nor a request for its return. The taxpayer also refers to ETB 429.08.115 issued on May 14, 1971 as supporting its position. Although the taxpayer concedes that this ETB was revised on August 10, 1982, it states that the revision was in response to specific legislation passed in 1974 dealing with "deposits" on "returnable containers for beverages and foods, including but not limited to soft drinks, milk, beer and mixers". The taxpayer argues that in respect to all other product containers and pallets, the legislation did not change the pre-July 1974 position which was that title to containers would be "deemed" to pass to the customer notwithstanding the name given to the amounts charged for the container, (ie., deposit, refund price,) and that any credits granted on return of the containers were repurchases by the seller.

ISSUES:

1. Does the fact that the taxpayer separately itemizes charges for generic pallets to some customers but not to others, convert those charges from being part of the selling price of the product, to a refundable security deposit?

DISCUSSION:

[1] WAC 458-20-115 (Rule 115)³ states in part:

Sales of packing materials to persons who sell tangible personal property contained therein or protected thereby are sales for resale and are not subject to the retail sales tax if title thereto passes with the goods contained therein. (Emphasis ours)

It further defines "packing materials" as including:

³WAC 458-20-115 was revised in 1988 in order to make the rule easier to read and understand. Although no substantive changes occurred, we have nevertheless referred to Rule 115 as it was written during the audit period.

...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.

The Department has consistently interpreted pallets as falling within the above definition of packing materials and taxable in the same manner.

Rule 115 further states:

Sales of containers to persons who sell tangible personal property therein, but who retain title to such containers which are to be returned, are sales for consumption. The retail sales tax or the use tax must be paid upon the sale or use thereof. The retail sales tax or the use tax must be paid upon the sale or use thereof. This class includes wooden or metal bottle cases, barrels, gas tanks, carboys, drums, bags and other items, when title thereto remains in the seller of the tangible personal property contained therein, and even though a deposit is not made for the containers, and when such articles are customarily returned to him. If a charge is made against a customer for the container, with the understanding that such charge will be cancelled or rebated when the container is returned, the amount charged is deemed to be made as security for the return of the container and is not part of the selling price for tax purposes.
(Emphasis ours.)

We believe that in order to determine whether separately itemized pallet charges are part of the selling price of the product, or merely refundable security deposits, Rule 115 requires a determination of whether title to the pallets passed to the customer upon delivery. If title passed to the customer upon delivery, then all pallet charges are part of the selling price of the product and all purchases of pallets by the seller are for resale. On the other hand, if title to the pallets is retained by the seller after delivery, then all purchases of pallets by the seller are for consumption and any amounts charged to the customer are deemed to be a security deposit and excludable from the selling price of the product sold. However, the mere fact that a separately itemized pallet charge is made is not determinative of the issue of title passing. Such a determination must be based upon all the circumstances and intentions of the parties involved in the transactions.

Applying the above analysis to the taxpayer's case, we find that title to the pallets passed to the customer upon delivery and that any subsequent returns constituted repurchases by the taxpayer.

In making this determination, we find the following factors persuasive.

1. The taxpayer originally did not separately itemize pallet charges to any of its customers, but implemented the procedure only upon the request of certain customers. Furthermore, only those customers who requested separate itemization received it on their invoices.
2. The pallets are generic and bear neither the taxpayer's name nor a request for return.
3. The taxpayer will grant credit for any generic pallet and does not limit it to just those pallets originating from the taxpayer.

DECISION AND DISPOSITION:

The taxpayer's petition is granted.

DATED this 31st day of July 1990.