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

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| 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 |) | |
| of |) | No. 90-246 |
| |) | |
| |) | |
| . . . |) | Registration No. . . . |
| |) | . . ./Audit No. . . . |
| |) | |

[1] RULE 136: MANUFACTURING--FRESH FRUITS AND VEGETABLES--PROCESSOR FOR HIRE--ASEPTIC PROCESSING OF JUICE. A taxpayer who aseptically processes juice, so that it can be stored unrefrigerated for long periods of time, is performing a manufacturing activity in preserving the fruit. However, since this taxpayer is not the owner of the juice, it is taxable as a processor for hire, not as a manufacturer.

[2] RULE 178: USE TAX--FILTER--USE AS A CONSUMER--TESTING--DEFECTIVE ITEM. When a filter ordered by taxpayer was never actually purchased or used for its intended purchase because it was unable to perform properly, no use tax is due.

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: . . .

DATE OF CONFERENCE: . . .

NATURE OF ACTION:

Taxpayer protests the assessment of service B&O tax on its activities of processing . . . juice and use tax on a filter.

FACTS AND ISSUES:

Hesselholt, A.L.J. -- Taxpayer's books and records were examined for the period . . . through As a result, an assessment in the amount of \$. . . was issued, which remains outstanding.

Taxpayer does aseptic processing of . . . juice. This is a process in which the juice is heated to a certain temperature and then cooled, and then put into special containers and vacuum sealed. The advantage of this process is that it allows the product to be maintained unrefrigerated for extremely long periods of time. The juice cannot be put in the special container without being through the heating and cooling process, and if it is not put in the container after the processing, the processing is worthless.

The Audit Division classified the taxpayer's activity as custom packing and taxed its income under the service and other category of the B&O tax, in part because taxpayer's contract with . . . , Inc., referred to it as a "packer," and it considered aseptic packing to be analogous to pasteurization of milk.

The audit also assessed use tax on a . . . produced by the Because no sales tax had been paid on it, use tax was assessed.

Taxpayer states that the filter was never actually acquired, because although the taxpayer had been invoiced for the filter and had it in its possession, the filter never performed properly and so was never used for commercial purposes or actually purchased. By the terms of its agreement with taxpayer, the . . . was required to provide a useable filter. Taxpayer never accepted or paid for the filter. Because . . . was unable to provide a working filter, taxpayer was unable to meet its commitments for processing and was forced into bankruptcy. Thus, taxpayer argues, the filter was never purchased or used, and therefore no use tax is due.

DISCUSSION:

[1] RCW 82.04.120 and WAC 458-20-136 (Rule 136) define manufacturing to mean activities by which skill is applied to materials to create a new or different substance. A processor for hire is a person who would be considered a manufacturer if it was using its own materials to create new substances. Rule 136(5). Taxpayer had been reporting its activities under the "Manufacturing--Fresh Fruits and Vegetables" category of the tax, assuming the Rule 136(9) was the closest thing to what it was actually doing. RCW 82.04.260(5) provides that a person who is

engaging within this state in the business of manufacturing by canning, preserving, freezing or dehydrating fresh fruits and vegetables; as to such persons the amount of tax with respect to such business shall be equal to the value of the products canned, preserved, frozen or dehydrated multiplied by the rate of three-tenths of one percent.

We agree that taxpayer's activity of aseptically processing . . . juice is most like preserving fresh fruits and vegetables.

Taxpayer's activity is unlike the pasteurization of milk because it does more than just sterilize the juice; it also enables it to be stored for long periods of time unrefrigerated. We find that this is akin to the preserving of fruit, but not taxable under this rate because it is not processing fresh fruit, but fruit that has already been processed into juice. We further cannot agree that it should be reporting under the manufacturing fresh fruit rate, because taxpayer is not engaged in the business of manufacturing, but is engaged as a processor for hire. Thus, it should be reporting tax under that classification, rather than the "Manufacturing--Fresh Fruits and Vegetables" under which it was reporting.

We understand that taxpayer is now processing juice at its plant. So long as taxpayer does not own the juice it is processing, it is taxable under the processing for hire category of the B&O tax.

[2] Use tax is due on the first use as a consumer within Washington on any tangible personal property purchased when the retail sales tax was not first paid on the item. RCW 82.12.020. A person who uses an item as a consumer is one who puts the item to use for its given purpose. In this case, taxpayer states that the filter was tested and found unable to perform the tax for which it was ordered. It was never used for commercial purposes, and was never purchased and never actually used for its intended purchase. Taxpayer essentially entered into a contingent contract which was not fulfilled. Although technically there should be some use tax due on the bailed use of the filter for testing, we deem it in this instance to be de minimis and therefore decline to impose it.

DECISION AND DISPOSITION:

Taxpayer's petition is granted in part.

DATED this 18th day of June, 1990.