Cite as Det. No. 99-238, 18 WTD 466 (1999)

BEFORE THE APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition For Refund and Correction of Assessment of	)	D E T E R M I N A T I O N
	)	No. 99-238
. . .	)	Registration No. . . .
	)	FY. . ./Audit No. . . .

[1] RULE 115; RULE 178; RCW 82.08.0276; RCW 82.12.0282. BEER KEGS – RETURNABLE BEVERAGE CONTAINERS – EXEMPTIONS. An out-of-state brewing company purchases and uses beer kegs to store and deliver its beer, which it sells wholesale to its distributors and retail to taverns and other customers. The brewing company is not required to pay either retail sales tax when it purchases the kegs or use tax when it delivers the kegs to its customers, provided the brewing company charges its customers a refundable deposit on each keg. Under these circumstances, the beer kegs are "returnable beverage containers" and therefore exempt from both retail sales tax and use 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:

Taxpayer protests use tax assessed on returnable beer kegs.[1]

FACTS:

Danyo, A.L.J. -- Taxpayer is a brewery that manufactures beer [outside Washington]. It sells the beer at wholesale to distributors in Washington and other states. It ships the beer to its distributors in beer kegs, which are transported on pallets. The distributors deliver the beer to taverns and other retail establishments. These customers are charged a refundable deposit on the kegs.[2] The deposit is refunded or credited to the customer when the empty kegs are returned to

[1] Identifying details regarding the taxpayer and the assessment have been redacted pursuant to RCW 82.32.410.
[2] Taxpayer states that until 1996 it charged a $. . . deposit per keg. After that, it charged $. . . per keg.

Taxpayer. The only time the deposit is not refunded is when the kegs are damaged while in the customer's possession. The emptied kegs are returned to [Taxpayer's manufacturing facility outside Washington] where Taxpayer refills them and reships them to distributors/customers in this, as well as, other states.

Taxpayer is registered to do business in Washington. The Department of Revenue (Department) reviewed Taxpayer's records for January 1, 1992 through June 30, 1996 and issued a tax assessment that included use tax on beer kegs and pallets and on various promotional items located in Washington. Taxpayer paid the assessment, but requested a refund of the use tax assessed on the kegs and pallets[3].

The Auditor's Detail of Differences and Instructions to Taxpayer (the report) explained that use tax was assessed because

> . . . in WAC 458-20-115, sales of containers (by your vendors) to persons who sell tangible personal property therein, but who retain title to such containers ([taxpayer]) are sales for consumption and are subject to retail sales tax at time of sale to you . . . It was not determined that retail sales tax had been paid on such items. Therefore, the use tax applies to uses of containers or other items to which the retail sales tax would apply, but for [sic] reason, was not paid at the time of acquisition.

The use tax was assessed on the returnable beer kegs based on the Department's administrative rule WAC 458-20-115 (Rule 115)[4], which governs "sales of packing materials and containers." The measure of the use tax was based on an estimated value and estimated number of kegs in Washington each year. The report explains:

> It is understood that the actual value of kegs or other items during periods of intermittent and recurrent use in this state cannot be easily determined with great precision or accuracy. For this audit period the value calculation would be difficult, time consuming, expensive, and uncertain in result.
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> Therefore, because of these facts and understandings, and in order to fix and determine the tax liability currently and for the future, the use tax is based upon the annual increased number of kegs and other items delivered into this state at the value of the deposits received.

Taxpayer disputes the Department's assessment of use tax on the beer kegs stating the beer kegs are returnable beverage containers that are exempt from both retail sales tax (RCW 82.08.0282) and use tax (RCW 82.12.0276). Taxpayer, also, disputes the calculation of the tax and measure used to determine the amount of tax due, stating that if the beer kegs are not found to be exempt,

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[3] [Footnote ommited]

[4] Rule 115 was amended effective October 3, 1993. The former Rule was in effect for part of the audit period. The amendment to the Rule, however, does not affect the outcome this determination.

then the correct measure of the use tax would be the rental value of the beer kegs as they are in Washington less than 90 days a year. Taxpayer further asserts that should the tax be upheld, it is entitled to a credit for local sales tax paid on the leased kegs.[5] Taxpayer relies on RCW 82.12.0276 and WAC 458-20-178(7)(ff).

Taxpayer's petition also objected to the use tax assessed on pallets, but did specifically assert any legal basis for this objection; nor, did Taxpayer provide any factual information regarding pallets. The audit report, only references to the assessment of use tax on "kegs, pallets and promotional items." To the extent that use tax may have been assessed on Taxpayer's pallets, we will refer to their taxability in the discussion portion below.

Taxpayer's petition also objected to the use tax assessed on promotion items, but Taxpayer withdrew that objection.

ISSUES:

(1) Are the beer kegs Taxpayer uses to transport the beer it sells to wholesale customers, exempt from Washington's use tax?

(2) Are the pallets on which taxpayer transports the beer kegs exempt from Washington's use tax?

(3) If taxable, what is the correct measure of the use tax on the beer kegs and pallets?

DISCUSSION:

Washington imposes a use tax on a consumer's first use of tangible personal property in this state on which Washington's retail sales tax has not been paid. RCW 82.12.020. Applying Rule 115, which applies to packing materials and containers, the Audit Division concluded that Taxpayer owed use tax on the beer kegs (and presumably the pallets) located in this state because Taxpayer should have paid retail sales tax when it first acquired the kegs. Since Taxpayer acquired the kegs outside of Washington, the Audit Division determined use tax was due.

Rule 115(3)(b)[6] explains, for B&O tax purposes, that:

> (b) 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 and subject to tax under the retailing classification. 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

[5] Taxpayer pays a tax on the leased kegs to the state in which it leases the kegs.
[6] This section was subsection (2)(b), under former Rule 115.

> not made for the containers, and when such articles are customarily returned to the seller . . . .

Taxpayer's kegs are containers within the class as defined in the above-cited section.[7] Taxpayer charges a returnable deposit for the containers. Rule115(3)(b) goes on to explain:

> [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 [B&O] tax purposes. *However, refer to the comments below for sales of containers for beverages and foods.*

(*Emphasis added).* Rule 115(3)(c)[8] explains the exception referred to in subsection (3)(b), as follows:

> Title to containers, whether designated as returnable or non-returnable, for beverages and food sold at retail, including beer, milk, soft drinks, mixers and the like, will be deemed to pass to the customer along with the contents. In such cases, amounts charged for the containers are part of the selling price of the food or beverage and subject to retailing tax when sold to consumers. *Sales to persons who will resell the food or beverages are wholesale sales . . .*

(Emphasis added). Under Rule 115 when food or beverages are sold in containers to a consumer, the title to the containers passes to consumers along with the contents. So when the taxpayer sells beer directly to consumers, these sales are retail sales and Rule 115(4)(a) explains that retail sales tax is due on these sales **"**except those specifically distinguished hereafter in this subsection." Rule 115(4)(b) specifically "distinguishes" the taxability of returnable food and beverage containers, as follows:

> Retail sales tax does not apply to sales of returnable food and beverage containers, and vendors may take a deduction from gross retail sales for the amount of such sales in reporting sales tax due, providing (i) the seller separately states the charge for the container and (ii) the separately stated charge is the amount the vendor will pay for a repurchase of the container. Return of the containers is a repurchase by the vendor, and sales tax is not due on amounts paid to the customer on such repurchases, since the vendor will resell the containers in the regular course of business. (RCW 82.08.0282.)

RCW 82.08.0282 exempts from retail sales tax "sales of returnable containers for beverages and foods, including but not limited to, soft drinks, milk, beer and mixers." Rule 115(4)(c) explains

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[7] Subsection (1) of the former Rule 115, was restated at Rule 115(2)(b) and contains the definition of "packing materials" which includes, . . . "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."

[8] This section was subsection (2)(c) of the former Rule 115.

that the retail sales tax does not apply to wholesale sales provided that Taxpayer takes a resale certificate. See RCW 82.08.050. Taxpayer sells beer in Washington at wholesale.

The Audit Division assessed use tax based on the following provision in the former Rule 115(4), which stated:

> (a) The use tax applies to uses of packing materials and containers to which retail sales tax would apply but, for any reason, was not paid at the time such materials and containers were acquired.

The revised rule contains the same provision, but has added other provisions:

> (5) Use tax.
> (a) The use tax applies to uses of packing materials and containers to which retail sales tax would apply but, for any reason, was not paid at the time such materials and containers were acquired.
> (b) The use tax applies to the use of packing materials, such as boxes, cartons, and strapping materials, by a manufacturer in Washington where the packing materials are used to protect materials while being transported to another site of the manufacturer for further processing.

The amended Rule 115(6) supplies several illustrations of when the use tax would be due. These illustrations were not available in the former rule. The example that most closely identifies a situation where Taxpayer would pay use tax is Example (6)(c):

> XY uses three types of pallets in its manufacturing operation. One type of pallet is used strictly for storing paper, which is in the manufacturing process. A second type of pallet is returnable and the customer is charged a deposit, which is refunded at the time the pallet, is returned. The third type of pallet is non-returnable and is sold with the product. XY is required to pay retail sales or use tax on the first two types of pallets. The third type of pallets may be purchased by XY without the payment of retail sales or use tax since these pallets are sold with the paper products.

Thus, under Rule 115, Taxpayer would owe use tax on the pallets on which it takes a refundable deposit. Taxpayer would owe use tax on the beer kegs, under either the former or the current version of the Rule, if there were not a specific statutory exemption similar to the retail sales tax exemption.

RCW 82.12.0276 provides a specific exemption that applies to Taxpayer's kegs. It states:

> Exemptions-- Use of returnable containers for beverages and foods**.** The provisions of this chapter [chapter 82.12.] shall not apply in respect to the use of returnable containers for beverages and foods, including but not limited to soft drinks, milk, beer, and mixers.

WAC 458-20-178(7) (Rule 178) is the administrative rule implementing this statute. It states.

> (7) Exemptions. Persons who purchase, produce, manufacture, or acquire by lease or gift tangible personal property for their own use or consumption in this state, are liable for the payment of the use tax, except as to the following uses which are exempt under RCW 82.12.0251 through 82.12.034 . . .
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> (ff) [t]he use of returnable containers for beverages and foods, including but not limited to soft drinks, milk, beer, and mixers.

The Taxpayer's beer kegs are returnable beverage containers. Rule 115. RCW 82.12.0276 specifically exempts returnable beverage containers from the use tax. The returnable nature of the kegs at issue here is demonstrated by the fact that the Taxpayer charges a refundable deposit that is refunded upon the receipt of the empty keg. Additionally, the audit report notes, and Taxpayer's petition confirms, that the kegs are returned to [taxpayer's manufacturing facility outside Washington], refilled, and redelivered to Taxpayer's customers in Washington and other states. It is the returnable nature of the kegs, which renders this exemption applicable. If the kegs were for resale, and non-returnable, this particular exemption would not apply.

The statutory exemption is clear on its face and requires no interpretation. While mindful of the general principle that exemptions from a taxing statute must be strictly construed in favor of taxation, *Budget Rent-A-Car, Inc. v. Department of Revenue*, 81 Wn.2d 171, 500 P.2d 764 (1972); *Evergreen-Washelli Memorial Park Co. v. Department of Revenue*, 89 Wn.2d 660, 574 P.2d 735 (1978), statutory language should be construed so that no word is superfluous, void, or insignificant. *UPS v. Dept. of Rev*., 102 Wn2d 355, 361, 362, 687 P.2d 186 (1984). The rules of statutory construction require that when possible the various provisions of an act be harmonized; this usually arises within particular statutory chapters. See *State v. Williams*, 62 Wn. App. 336, 338, 813, P.2d 1293, review denied, 117 Wn.2d 1027 (1991) (harmonizing RCW 10. 05.140 and RCW 10.05.160). In seeking to harmonize provisions of a statute, there may arise conflicts between general provisions and specific exemptions. This may result in an apparent conflict between the rules of statutory construction, which provide that doubts regarding the construction of a tax statute are to be construed against the taxing power[9] and also that tax exemptions are to be strictly construed in favor of the tax and may not be extended beyond the scope intended by the Legislature.[10] In addressing this apparent conflict the Court of Appeals recently stated that:

> In resolving the apparent conflict between these two rules of statutory construction, it is useful to return to the standard maxim that a specific statue controls a general one. Using this maxim, the rule requiring narrow construction of tax exemptions addresses a more specific area of tax law than does the general requirement that where there is an ambiguity in the statute, it is construed against the taxing authority.

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[9] Duwamish Warehouse Co. v. Hoppe, 102 Wn. 2d 249, 254, 684 P.2d 703 (1984) (citing MAC Amusement Co. v. Department of Revenue, 95 Wn 2d 963, 966, 633 P.2d 68 (1981)).

[10] MAC Amusement Co. 95 Wn. 2d at 966.

Martinelli v. Department of Rev., 80 Wn. App. 930, 940, 940, 912 P.2d 521 (1996).

All the provisions of the act must be considered in their relation to each other and, if possible, harmonized to insure proper construction of each provision. *Burlington Northern v. Johnston*, 89 Wn.2d 321,326, 572 P.2d 1085 (1977). In this instance, the statutes at issue express a clear intent to exempt returnable beverage containers from use tax as well as retail sales tax. The Legislature intended to levy sales tax and use tax as uniformly as possible so that all persons similarly situated would be treated as much alike as possible. *Gandy vs. State*, 57 Wn.2d 690, 359 P.2d 302 (1961).

Neither Rule 178 nor the statute limits the exemption to sales to end users or consumers. Rule 178(ff), specifically exempts from use tax containers in which beer is sold whereas; Rule 115 applies generally to containers and packing materials as evidenced by the examples contained therein. Therefore, we find the use tax was incorrectly assessed on Taxpayer's returnable beer kegs located in this state.

We find that the Taxpayer's kegs are returnable containers specifically exempt from Washington's use tax pursuant to RCW 82.12.0276. Rule 178. To the extent that Taxpayer's kegs were returned, the use tax is not due. Because the tax is not properly assessed, it is not necessary to determine whether the method used for assessing the tax was appropriate.

Under Rule 115, we find the pallets, which are not specifically exempt under any statutory provisions, are not exempt from use tax. The use of the pallets, to the extent such use is similar to the example provided by Rule 115, quoted above, are subject to use tax if for any reason, retail sales tax was not paid when Taxpayer first acquired them. To the extent that Taxpayer leased pallets and paid sales tax in another state, Taxpayer would be entitled to a credit.

DECISION AND DISPOSITION:

Taxpayer's petition is granted. This matter is remanded to the audit division for cancellation of the use tax assessed on the returnable beer kegs and for refund of use tax paid plus statutory interest.

Dated this 30th day of June 1999