

Memorandum

195.1590

To : Mr. Glenn A. Bystrom
Principal Tax Auditor

Date: December 16, 1992

From : Gary J. Jugum
Assistant Chief Counsel

Subject: District AP Inquiry - Sales of Pallets

This is in response to your memorandum of June 18, 1992 inquiring about the taxability of the sale of pallets by A--- W--- Corporation ("A---") to R--- G--- Company ("R--- ").

We understand that A--- is a producer and distributor of bottled water. A--- always ships its products to customers on pallets. A--- makes no charge for the pallets and retains title to same. A--- considers the pallets to be returnable containers and pays tax to their suppliers on the purchase price of the pallets. All pallets are generally returned by the customers to A---; however, if a customer should want to keep the pallets, a specific charge is made and invoiced separately from the bottled water.

R--- G--- Company purchased a large quantity of bottled water from A--- for resale. The product was delivered on both new and used pallets. R--- informed A--- that they wanted to keep the pallets for the purpose of transporting merchandise among their various stores. A--- invoiced R--- for the pallets and added "sales tax." R--- refused to pay the "sales tax," citing Regulations 1589 and 1667.

It is our opinion that tax applies to the sales in question.

It is true that Regulation 1589, "Containers and Labels" provides in paragraph (b)(1)(C) that tax does not apply to sales of "All containers when sold with the contents, if the sales price of the contents is not required to be included in the measure of the sales tax or the use tax."

It is also true that we have (perhaps wrongly) interpreted this section to apply in the resale context. That is, where a nonreturnable container is used as a shipping device to move goods from a manufacturer to a wholesaler, we permit the manufacturer to acquire the container for resale, and we tax no portion of the charge made by the manufacturer to the wholesaler as a charge made for the container. The manufacturer can fill the container without incurring a use tax, and the wholesaler can discard the container (as "waste") without incurring a use tax. (Note that Regulation 1630 does not apply in cases of this type, where the shipper is the seller of the contents.)

In the case in question, the original transaction between A--- and R--- was not subject to tax in whole or in part. The containers were "returnable containers," and were properly taxed to A---.

Subsequent to the original delivery, while the containers were with R---, R--- agreed to make a payment for the containers, and A--- agreed that R--- need not return the containers but could keep them. This was a sale transaction. This was a retail transaction, because R--- acquired the containers for its own use in transporting merchandise amongst its various stores. There is no exemption which is applicable to this sale transaction.

The statutory exemption for containers is necessary because filling a container is a use. Containers may be sold tax free to persons who fill the containers and sell the containers with their contents, with the understanding that the containers are not to be returned. Containers may be sold tax free to persons who fill the containers and sell the containers with their contents, in the circumstance where the containers will be returned to the persons who fill the containers. There is no exemption for sales of containers to persons who use the containers, not for shipping goods to others, but for internal purposes.

Additionally, A--- is not entitled to a tax-paid purchases resold deduction on new pallets purchased tax-paid and sold under the described circumstances. A--- used the pallets by filling the pallets prior to the time the pallets were sold to R---. The pallets were purchased as returnable contents and were used as returnable containers. The pallets were purchased as returnable containers and were taxable as such.

GJJ:sr