NO. 98316-0

SUPREME COURT OF THE STATE OF WASHINGTON

ADVANCED H2O, LLC & TYSON FRESH MEATS, INC.,

Petitioners,

v.

STATE OF WASHINGTON, DEPARTMENT OF REVENUE,

Respondent.

ANSWER TO PETITION FOR REVIEW

ROBERT W. FERGUSON
Attorney General

Rosann Fitzpatrick, WSBA No. 37092
Assistant Attorney General
Revenue Division, OID No. 90127
P.O. Box 40123
Olympia, WA 98504-0123
(360) 753-5515

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I. INTRODUCTION

Businesses that rent pallets for their own use are required to pay sales or use tax on the pallet rental fees. Here, the undisputed facts demonstrated that Advanced H2O, LLC and Tyson Fresh Meats, Inc. rented pallets for their own use in delivering their products, actually used the pallets for that purpose, and did not sublease the pallets to their customers. The Court of Appeals correctly held that the pallet rentals did not qualify as wholesale sales under either the lease "for the purpose of sublease" or "purchase-for-resale" exclusions to the retail sales tax.

The Court of Appeals drew three unassailable conclusions as to the plain meaning of the governing tax laws. First, renting pallets for a company's own use in delivering products was a purpose "other than for resale" or "sublease." Second, property was not leased "for the purpose of sublease" where, as here, the lease ended when the lessee transferred possession to a third party (the purported sub-lessee). Third, the fact that a product seller factored its pallet rental costs into the selling price of its products did not convert its product sales into a "sublease" of the pallets.

The Court of Appeals' decision is consistent with the plain meaning of the tax statutes, well-established Washington case law, and appellate decisions from other jurisdictions addressing the very same form of pallet rental transaction. The Petition for Review should be denied.

II. COUNTERSTATEMENT OF ISSUES

1. Does a manufacturer's rental of pallets for use in delivering its products to customers qualify as a lease "for the purpose of sublease" within the meaning of RCW 82.04.050(4)(b)?

2. Does a manufacturer's rental of pallets for use in delivering its products to customers qualify as a purchase "for the purpose of resale" under RCW 82.04.050(1)(a)(i) and WAC 458-20-115?

III. COUNTERSTATEMENT OF THE CASE

A. Advanced H2O and Tyson's Use of CHEP's Pallet Pooling Service

Advanced H2O manufactured and sold bottled water and other beverage products to various retailers in Washington. AR-H2O 91 ¶¶ 4-5, 139-50.[1] Tyson processed and sold beef products in Washington. AR-Tyson 88, ¶ 3. Both businesses rented pallets from CHEP USA, Inc. to deliver their products to customers. AR-H2O 91, ¶ 7; AR-Tyson 88, ¶ 5.

CHEP operates a pallet pooling service for manufacturers, distributors, and retailers. AR-H2O 130. CHEP issues, collects, conditions, and reissues pallets, which help companies like Advanced H2O and Tyson streamline distribution and transportation of their

[1] The Administrative Record for Advanced H2O, LLC is numbered AR 1 through AR 291, and that of Tyson Fresh Meats, Inc. is numbered AR 1 through AR 292. For clarity, this brief refers to the respective administrative records as "AR-H2O" and "AR-Tyson."

products to others. Each CHEP pallet is marked with the CHEP logo and the words "Property of CHEP" or "Owned by CHEP." AR-H2O 118.

Every CHEP pallet is subject to the standard terms and conditions of CHEP's pallet rental program. AR-H2O 130; AR-Tyson 125. Advanced H2O and Tyson's "Hire Agreement" with CHEP stated that CHEP retained ownership and legal title of the pallets at all times:

> **6. OWNERSHIP OF EQUIPMENT**
> (a) CHEP never sells or transfers ownership of its Equipment. Customer acknowledges and agrees that each item of Equipment has a special value to CHEP and that CHEP repairs, maintains[,] handles and otherwise administers the circulation of all Equipment as part of a pool[.]
> (b) Customer acknowledges and agrees that despite any other clause in this Agreement[,] CHEP remains the owner of the Equipment at all times[.] Neither Customer nor any other person is entitled to purchase or sell the Equipment or use, dispose of or otherwise deal with Equipment in any way that is inconsistent with CHEP's ownership of the Equipment or the terms of this Agreement[.] Payment of a Lost Equipment Fee or any other circumstance or event does not constitute or result in any transfer of any property right or other interest in the Equipment by or from CHEP.

AR-H2O 118, ¶ 6; *see also* AR-Tyson 99, ¶ 6.

CHEP's invoices reiterated that CHEP "is the exclusive owner of all CHEP Equipment" and the payment of any fee does not result in "any transfer of any property right or other interest in any CHEP Equipment by or from CHEP." AR-H2O 137; AR-Tyson 134.

CHEP permitted its customers to use the pallets to ship goods only to other businesses with a separate rental agreement with CHEP. AR-H2O 114-15, ¶ 5(c); AR-Tyson 98-99, ¶ 4.1(I). Absent CHEP's consent, customers were prohibited from transferring pallets to persons not under contract with CHEP, referred to as a "Non Participating Distributor." AR-H2O 114-15, ¶ 5(c); 117, ¶ 5(d). In exchange for granting consent, CHEP imposed surcharges to cover the burden and expense of retrieving the pallets. AR-H2O 114-15, ¶ 5; 123-24, ¶ 6(c).

CHEP's customers agreed to accept transfers of CHEP pallets from other CHEP customers and to assume responsibility to CHEP for every pallet they received. AR-H2O 110, ¶¶ 1.1, 1.3; 117, ¶ 5(e); AR-Tyson 112, ¶ 5.2 (defining "Quantity of Equipment on Rental"). When customers shipped their products on pallets to distributors or retailers who were also customers of CHEP, the customer was required to notify CHEP as to the quantity received and the location of the pallets. Once a customer accepted a transfer of pallets, the pallets were subject to the receiving customer's contract with CHEP. CHEP then deducted the transferred pallets from the delivering customer's quantity of pallets "on Hire" and added them to the receiving customer's quantity of pallets "on Hire." *Id.*

CHEP charged an "Issue Fee" for every pallet it provided to a customer. AR-H2O 113. The issue fee varied depending on the quantity of

pallets on hire and the average number of days a customer had possession before transferring a pallet to another CHEP customer or returning it to CHEP. *Id.*; AR-Tyson 115-16, ¶¶ 2, 5; AR-H2O 113.

Advanced H2O and Tyson used the CHEP pallets to ship their products to customers. AR-H2O 91, ¶ 5; AR-Tyson 88, ¶ 4. After a pallet was unloaded, it was either returned to a CHEP depot for repair and reconditioning or transferred to another CHEP customer. AR-H2O 130.

On a weekly basis, CHEP issued an invoice to Advanced H2O and Tyson detailing all inbound and outbound movements of pallets. AR-H2O 117, ¶ 3(b), 139-50. The invoices stated the total number of "Rental Days" multiplied by the total number of pallets for which each customer was responsible. AR-H2O 139; AR-Tyson 131-38. The number of "Rental Days" included only the time each CHEP customer kept possession of the pallets; once the pallets were transferred to a customer, the customer—not Advanced H2O or Tyson—assumed liability to CHEP for the pallets.

Advanced H2O paid sales taxes on the pallet rental fees it paid to CHEP. Tyson did not pay sales taxes on its pallet rental transactions.

B. Procedural Background

Advanced H2O filed a refund request with the Department of Revenue to recover the sales taxes it had paid on the rented pallets. AR-H2O 92, ¶ 10. The Department denied the request. Following an audit, the

Department assessed use taxes on Tyson's pallet rentals. AR-Tyson 150. Both businesses appealed the Department's actions in the Board of Tax Appeals under RCW 82.03.190. AR-H2O 279-91; AR-Tyson 267-92.

The Board ruled in favor of the taxpayers, and the Thurston County Superior Court subsequently reversed, reinstating the tax assessments. AR-H2O 22; AR-Tyson 21. The Court of Appeals issued a published opinion affirming the Superior Court. *Dep't of Revenue v. Advanced H2O, LLC & Tyson Fresh Meats, Inc*., 11 Wn. App. 2d 384, 453 P.3d 1011 (2019).

In rejecting their appeal, the Court of Appeals explained it was "simply not possible within the plain meaning of a sublease and the framework of their own pallet leases with CHEP" for Advanced H2O or Tyson (the "Manufacturers") to qualify for the lease "for the purpose of sublease" exclusion under RCW 82.04.050(4)(b). *Advanced H2O*, 11 Wn. App. 2d at 400. The Court of Appeals reasoned that the Manufacturers did not lease the pallets for sublease because their lease ended upon the transfer of possession, and their customers were under contract with CHEP to assume responsibility for the transferred pallets. The Court of Appeals rejected the notion that the Manufacturers "subleased" the pallets by virtue of the fact they recovered their pallet rental costs through the selling price of their products. *Id.* at 401.

The Court of Appeals further held that using the pallets to deliver products to customers "plainly constitutes making use of the pallets for a purpose other than merely renting or leasing the pallets" under the tax regulation on lease transactions, WAC 458-20-211. *Advanced H2O*, 11 Wn. App. 2d at 404. Finally, the court concluded the pallet rentals do not qualify as wholesale purchases of "packing materials" to be sold with a manufacturer's products, under WAC 458-20-115, because the Manufacturers did not, in fact, resell or sublease the pallets with their products; they merely used the pallets to make deliveries. *Id.* at 405.

The Manufacturers now seek this Court's review.

IV. REASONS WHY THE COURT SHOULD DENY REVIEW

As a basis for review, the Manufacturers make only passing reference to RAP 13.4(b)(1), (2), and (4), which permit review by this Court if the petitioner shows the decision below conflicts with existing appellate authority or raises an issue of substantial public importance. This Court should deny the petition because the Court of Appeals' decision neither conflicts with any decision of this Court or of the Court of Appeals, nor raises an issue of substantial public interest. Rather, the opinion correctly applies the plain meaning of the tax statutes in concluding the undisputed facts preclude the pallet rentals from qualifying as wholesale sales.

Specifically, the rented pallets do not qualify as a lease "for the purpose of sublease" under RCW 82.04.050(4)(b) and WAC 458-20-211, because the Manufacturers acquired the pallets for their own use in delivering their products to customers, and their lease ended upon the transfer of possession. Property that is no longer under lease cannot be "subleased." Further, the rented pallets do not qualify under the sale "for the purpose of resale" exclusion under RCW 82.04.050(1)(a)(i) and WAC 458-20-115 because the Manufacturers did not, and could not, "resell" the pallets to their customers. Rather, each successive transferee in the supply chain leased the pallets from CHEP.

The Court of Appeals' analysis of the issues in no way diverged from this Court's plain meaning analysis, and is cogent and correct. There is no need for this Court to grant review.

A. The Court of Appeals' Decision Does Not Conflict with Precedent: The Court Applied a Straightforward Plain Meaning Analysis to Hold That the Leased Pallets Were Not Exempt as Leases "For the Purpose Of Sublease"

Although couched in terms of an alleged conflict with precedent regarding statutory construction, the Manufacturers' primary argument amounts to a disagreement with the Court of Appeals' legal analysis involving the meaning of lease "for the purpose of sublease." *See* Pet. at 13 ("[T]he Court of Appeals fundamentally changed the meaning" of

the statute by giving the term "sublease" its ordinary meaning.). The Court of Appeals did not err. The Manufacturers simply advocate for a hyper technical and unrealistic interpretation that is contrary to the plain meaning of the tax statutes, well-established Washington case law on wholesale sales, and common sense.

The Court of Appeals' decision is unremarkable under the facts: the Manufacturers did not sublease the pallets to their customers because they had no rights in the pallets after transfer and their customers were already under contract with CHEP to lease the same pallets. Contrary to the Manufacturers' arguments, the Court of Appeals' decision comports entirely with the plain meaning of the governing tax statutes.

1. The pallet rentals are "retail sales" under the plain meaning of the tax statutes

The Manufacturers contend review is necessary because the Court of Appeals' decision fails to carry out the legislative intent to exempt lease-for-sublease transactions from retail sales tax. But the Court of Appeals correctly held that the pallet rental transactions do not qualify as leases-for-sublease under the plain meaning of the tax statutes.

Washington imposes a retail sales tax on "each retail sale," including "successive retail sales of the same property."

RCW 82.08.020(1), (6).[2] A "retail sale" "includes the renting or leasing of tangible personal property to consumers." RCW 82.04.050(4)(a). "Consumer" is broadly defined to include "any person who purchases, acquires, owns, holds, or uses any article of tangible personal property irrespective of the nature of the person's business" other than for an exempt "purpose." RCW 82.04.190(1). "Lease or rental" means "any transfer of possession or control of tangible personal property for a fixed or indeterminate term for consideration." RCW 82.04.040(3)(a). A lease or rental of tangible personal property is exempt from retail sales tax only if it was "for the purpose of sublease or subrent." RCW 82.08.010(11). Likewise, a sale of tangible personal property is exempt if it was "for the purpose of resale as tangible personal property in the regular course of business without intervening use." RCW 82.04.050(1)(a)(i).

The Court of Appeals correctly held that the Manufacturers' pallet rentals plainly do not qualify as leases-for-sublease because the Manufacturers rented the pallets for their own use in delivering products, and they did not sublease the pallets to their customers.

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[2] Washington also imposes a use tax, which is a complementary tax applicable to each retail sale on which the sales tax was not previously paid for whatever reason. RCW 82.12.020(1)(a); *Glen Park Assocs., LLC v. Dep't of Revenue*, 119 Wn. App. 481, 494 n.1, 82 P.3d 664 (2003). The use tax incorporates by reference most of the same statutory exemptions applicable to a retail sale. *Activate, Inc. v. Dep't of Revenue*, 150 Wn. App. 807, 814, 209 P.3d 524 (2009). The legislative intent of the sales and use tax scheme is to tax each item of tangible personal property that is sold or used in Washington as a consumer, absent a specific statutory exception.

The Manufacturers contend the Court of Appeals erroneously relied on Black's Law Dictionary in giving meaning to the term "sublease." They claim the court "fundamentally altered the plain meaning of the statute" in doing so. Pet. at 12. But as the Court of Appeals correctly observed, the Legislature did not, in fact, define "sublease" or "subrent." *Advanced H2O*, 11 Wn. App. 2d at 400. Thus, it was perfectly appropriate for the Court to consult the dictionary definition of that term.

The dictionary definition used by the Court of Appeals is entirely consistent with the statutory definition of "lease." *Compare* Black's Law Dictionary 1724 (11th ed. 2019) (defining "sublease" as "a lease by a lessee to a third party, transferring the right to possession to some or all of the leased property for a term shorter than that of the lessee") *with* RCW 82.04.040(3)(a) ("'Lease or rental' means any transfer of possession or control of tangible personal property for a fixed or indeterminate term for consideration.").

Contrary to the Manufacturers' argument, the statute defining "lease" does not create a "specialized" meaning that materially differs from the common law or common dictionary definition of the term. Pet. at 12. In fact, the statute codifies the common law elements: the exchange of consideration for the right to possess or use property for a period of time.

Because the Manufacturers' lease of the pallets ended upon transferring possession to their customers, they did not, and could not, "sublease" the pallets as part of their product sales. As a matter of law, the amount the Manufacturers' customers paid for the products they purchased was not "consideration" for their own possession or use of the pallets for any period of time. RCW 82.04.040(3)(a) (defining "lease").

The Manufacturers argue that "sublease" must be given a much broader meaning than its common law or dictionary definition because "lease" is statutorily defined as a transfer of possession, not the transfer of a legal "right" to possession. This is a distinction without a difference. The existence of *any* sale transaction imports a contractual (and thus legally enforceable) right in the buyer to receive the bargained-for consideration. *See* RCW 82.04.040(1) ("'sale' means any transfer of the ownership of, title to, or possession of property for a valuable consideration[.]"). In the context of a lease transaction, consideration is paid in exchange for the right to possess and control the leased property for a period of time. Like the common law or dictionary definition, the statutory meaning of "lease" requires a transfer of possession (or right to possession) of the property for a period of time, for consideration. The Court of Appeals did not err by relying on the Black's Law Dictionary definition of "sublease."

2. The Manufacturers acquired the pallets for a purpose "other than for sublease"

The Manufacturers assert the Court of Appeals applied the "wrong test" by incorporating the terms of the purchase-for-resale exclusion under RCW 82.04.050(1)(a)(i) into the analysis of the lease-for-sublease exclusion under RCW 82.04.050(4)(b). Pet. at 8. Specifically, the Manufacturers claim the court erroneously held that their "intervening use" of the rented pallets was a taxable event precluding wholesale sale treatment of the pallet rentals. The Court of Appeals did not err.

RCW 82.04.050(1)(a)(i) excludes from the definition of "retail sale" sales of tangible personal property "for the purpose of resale as tangible personal property in the regular course of business without intervening use[.]" Under this definition, a business must pay sales or use tax on its own use of an item even if it purchased the item for resale and actually resold that item. *Activate, Inc. v. Dep't of Revenue*, 150 Wn. App. 807, 818, 209 P.3d 524 (2009). The lease-for-sublease exclusion under RCW 82.04.050(4)(b) does not specifically reference "intervening use." RCW 82.04.050(4)(b). However, the tax regulation on leasing and renting tangible personal property explains that a lessee's intervening use of leased property disqualifies it from claiming a wholesale sale exemption. WAC 458-20-211(5)(a)(ii). The Court of Appeals properly applied the tax

regulation in rejecting the Manufacturers' contention that their pallet rentals qualified as wholesale sales.

Contrary to the Manufacturers' argument, the "intervening use" analysis applies as much to a rental transaction as to an ordinary sale of tangible personal property. The Legislature broadly defined "retail sale" to include "any sale, lease, or rental for *any purpose* other than for resale, sublease, or subrent." RCW 82.08.010(11) (emphasis added). A purchaser's own use of the property prior to a subsequent sale, lease, or rental shows the property was acquired for a purpose "other than for resale, sublease, or subrent." Here, the Manufacturers leased the pallets for their own use in delivering products to customers, they actually used the pallets for that purpose, and they retained possession and control of the pallets for the entire rental period covered by their rental payments to CHEP. The Court of Appeals did not err in holding that Advanced H2O's and Tyson's own use of the pallets in delivering their products to customers disqualified the pallet rentals from wholesale treatment.

The Manufacturers provide no appellate authority from any jurisdiction supporting the proposition that renting property for use in delivering products to customers is not a "purpose other than for resale" or "sublease" for sales and use tax purposes. Instead, they resort to a hypertechnical and unrealistic application of the lease-for-sublease

exclusion that defies common sense and conflicts with related statutory provisions requiring businesses to pay sales or use tax on the items they use in carrying out their business activities.[3]

3. The selling price of the Manufacturers' products was not "consideration" for their customers' possession of the pallets for purposes of a "sublease"

The Court of Appeals correctly held that the Manufacturers' ability to recoup their pallet rental costs by factoring them into the price of their products did not convert their product sales into a "sublease" of the pallets used in delivering goods to customers. The Manufacturers' arguments to the contrary ignore the essential feature of a lease: the payment of consideration in exchange for the possession or control of tangible personal property for a period of time. The Manufacturers could not sublease equipment they no longer had under lease.

[3] The Court of Appeals' decision here is consistent with numerous decisions from jurisdictions with similar statutes addressing the very same form of pallet rental agreement between CHEP and its customers. *See Brambles Indus., Inc. v. Indiana Dep't of Revenue*, 892 N.E.2d 1287 (2008) (rental of CHEP pallets does not qualify as an exempt sale-for-resale of "nonreturnable" containers); *In the Matter of the Appeal of Imperial Sugar Company from a Decision by the Department of Revenue*, 2002-108, 6/11/2003 (Wyo. Bd. Eq.) (rented pallets are not "components" of products sold by CHEP lessee); Advisory Opinion No. S080811A, 10/18/2011, N.Y. Dep't of Taxation & Finance (leased pallets in a pooling arrangement are not sales-for-resale or sales of exempt packaging materials); Private Letter Ruling #04-015, 5/31/2005, Utah Tax Comm. (CHEP lessee is "the final consumer of the pallets for that period for which it is entitled to the right of possession or use under the lease"); California Sales Tax Counsel Ruling No. 195.1526 (1/2/98; 5/14/98) (a manufacturer's lease of pallets in a pooling arrangement "is subject to use tax measured by rentals payable"). AR-H2O 220-50.

The rental fees the Manufacturers paid to CHEP covered the rental period during which they were using the pallets themselves. There was no overlap in their own rental period and the rental period commencing when their customers took possession. Thus, the amounts the Manufacturers charged for their products was not "consideration" for their customers' right to possess or control the transferred pallets for *any* period of time. RCW 82.04.040(3)(a) (defining "lease or rental"). As the Court of Appeals stated: "The Manufacturers cannot sublease a pallet when they no longer lease the pallet themselves. Thus, the Manufacturers' claim that it subleased the pallets to their customers is simply not possible within the plain meaning of a sublease and the framework of their own pallet leases with CHEP." *Advanced H2O*, at 11 Wn. App. 2d at 400.

The Court of Appeals' analysis is consistent with well-established Washington case law. Washington courts interpreting the resale exemption have consistently held that items a seller uses to provide a service or sell a product are not resold to the customer, regardless of whether the expense is factored into the selling price. *See, e.g., Black v. State*, 67 Wn.2d 97, 103, 406 P.2d 761 (1965) (corporation leasing a cruise ship did not resell it by leasing out individual cabins); *Activate*, 150 Wn. App. 807 (seller of cellular phone services did not "re-sell" phones it provided at no extra charge); *Mayflower Park Hotel, Inc. v. Dep't of Revenue*, 123 Wn. App.

628, 632, 98 P.3d 534 (2004) (hotel did not "re-sell" room furnishings and amenities when it incorporated their cost in the rate charged for each room); *Glen Park Assocs., LLC v. Dep't of Revenue*, 119 Wn. App. 481, 82 P.3d 664 (2003) (purchaser of an apartment building did not acquire the appliances included in the rental units for purposes of resale).

4. The Manufacturers did not "sublease" the pallets to their customers

The Court of Appeals correctly relied on this Court's decision in *Gandy v. State*, 57 Wn.2d 690, 359 P.2d 302 (1961), in concluding the "lease-for-sublease" exemption does not apply where, as here, a lease ends when the leased property is transferred to a third party.

In *Gandy*, this Court explained the renting or leasing of tangible personal property is taxable as a series of sales, in which the taxable incident is the right to continued possession of the leased property for the period of time covered by each rental payment: "Each rental payment relates to a period of possession. It is this possession for which the lessee contracts and for which the periodic consideration is given." *Gandy*, 57 Wn.2d at 695. The Court of Appeals correctly followed *Gandy* in holding the Manufacturers did not acquire the CHEP pallets for the purpose of sublease. *Advanced H2O*, 11 Wn. App. 2d at 402.

According to the Manufacturers, *Gandy* is inapposite because it

was decided under a previous version of the sales tax statutes. But there is no material difference between the applicable tax statutes in *Gandy* and in this case. RCW 82.04.040(3)(a) defines "lease or rental" as "any transfer of possession or control of tangible personal property for a fixed or indeterminate term for consideration." This language codifies the common law definition. *See Gandy*, 57 Wn.2d at 694 (describing the "usual definition" of a lease as "a contract whereby one party gives to another the right to the use and possession of property for a specified period of time and, ordinarily, for fixed payments"). The taxable incident of a lease is the exchange of consideration for the right to possess or use property for a period of time. RCW 82.04.040(3)(a). The amounts the Manufacturers charged for their products was not consideration for their customers' own possession or use of the pallets for any period of time.

B. The Court of Appeals Correctly Held That the Leased Pallets Did Not Qualify as Wholesale Purchases of "Nonreturnable" Packing Materials Under WAC 458-20-115

The Manufacturers further contend their pallet rentals fall within an "exception" to the retail sales tax under WAC 458-20-115 (Rule 115). Pet. at 18. Rule 115 does not create any such "exception." Rather, it explains how the purchase-for-resale exemption under RCW 82.04.050(1)(a) applies to the sale of "packaging materials" to product sellers. Rule 115 explains that such transactions are taxable retail

sales where, as here, a product seller purchases packaging materials for its own use rather than for the purpose of reselling them to customers.

The Court of Appeals correctly held the rented pallets do not qualify for treatment as wholesale purchases under Rule 115 because the Manufacturers rented the pallets solely for the purpose of using them to deliver their products to customers, and they did not resell or sublease the pallets. The Court of Appeals correctly rejected the Manufacturers' contention that they leased the pallets for sublease, stating "any interest that the Manufacturers had in the pallets terminated upon transfer of the pallets to the customer." *Advanced H2O*, 11 Wn. App. 2d at 405. The transferred pallets were subject to a preexisting rental agreement between the Manufacturers' customers and CHEP. CHEP is the person that leased the pallets to each successive transferee in the pallet pool.

The Manufacturers append several published tax determinations to their petition, which they contend support their position that the rented pallets are exempt from sales or use tax. To the contrary, those tax determinations support the Court of Appeals' application of Rule 115. Before CHEP offered its pallet pooling services, manufacturers and distributors typically entered into barter arrangements with retailers in which they agreed to trade loaded pallets for an equal number of empty ones upon delivery. In its published tax determinations, the Department

has explained that businesses must pay sales or use tax on pallets purchased for use in such exchange arrangements. This is because the pallets are acquired for a purpose other than resale, i.e., using them either to deliver goods or to exchange for other pallets that can be reused. AR-Tyson 71-76 (Det. No. 01-143, 24 WTD 324 (2005)).

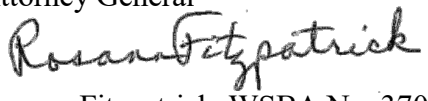
Just like a manufacturer that acquires pallets for use in a barter arrangement, Advanced H2O and Tyson are the taxable "consumers" of the pallets because they rented them for a purpose "other than for resale, sublease, or subrent." RCW 82.080.010(11). Moreover, Advanced H2O and Tyson retained possession and control of the pallets for the entire rental period for which they paid rent. They are the ones that enjoyed the use value of the rented pallets. The Court of Appeals did not err in rejecting the Manufacturers' reliance on Rule 115.

V. CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals does not merit this Court's review. The Petition should be denied.

RESPECTFULLY SUBMITTED this 22nd day of April, 2020.

ROBERT W. FERGUSON
Attorney General



Rosann Fitzpatrick, WSBA No. 37092
Assistant Attorney General
Attorneys for Respondent

PROOF OF SERVICE

I certify that on April 22, 2020, I caused to be electronically filed this document with the Clerk of the Court using the Washington State Appellate Courts' e-file portal, through my legal assistant, which will send notification of such filing to all counsel of record at the following:

Brett S. Durbin, Counsel for Petitioners
durbinb@lanepowell.com
Sojotj@lanepowell.com

Pear Brown, Legal Assistant
brownp@lanepowell.com

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 22nd day of April, 2020, at Tumwater, WA.

s/ Rosann Fitzpatrick
Rosann Fitzpatrick, Assistant Attorney General

ATTORNEY GENERAL'S OFFICE - REVENUE & FINANCE DIVISION

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