STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
GENESEE BREWING COMPANY, INC.	:	DECISION DTA NO. 817305
for Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the period December 1, 1994 through August 31, 1997.	:	

The Division of Taxation filed an exception to the determination of the Administrative Law Judge issued on March 1, 2001 with respect to the petition of Genesee Brewing Company, Inc., 445 St. Paul Street, Rochester, New York 14605. Petitioner appeared by Nixon Peabody LLP (John R. McQueen, Esq., of counsel). The Division of Taxation appeared by Barbara G. Billet, Esq. (James Della Porta, Esq., of counsel).

The Division of Taxation filed a brief in support of its exception, petitioner filed a brief in opposition and the Division of Taxation filed a reply brief. Oral argument, at the Division of Taxation's request, was heard on November 14, 2001 in Troy, New York.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUES

I. Whether petitioner's purchases of wooden pallets and bungs are exempt from the imposition of sales tax pursuant to Tax Law § 1115(a)(19), which provides an exemption from

sales tax on retail sales of cartons, containers and other packaging materials used or consumed by a vendor in packaging or packing tangible personal property for sale.

II. Whether, in the alternative, the wooden pallets and bungs may be deemed to have been purchased for resale.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for findings of fact "5", "9", "11", "12" and "17" which have been modified. We have also made an additional finding of fact. The Administrative Law Judge's findings of fact, the modified findings of fact and the additional finding of fact are set forth below.

Genesee is a New York corporation engaged in the business of brewing and selling beer.

Genesee sells its product primarily to wholesale distributors. The beer is sold in cans, bottles and kegs. The distributors arrange to pick up the product at Genesee's plant in Rochester either by common carrier or by using the distributor's own truck.

Genesee delivers a small amount of its product to purchasers located in Monroe County. Genesee makes these deliveries in its own trucks.

We modify finding of fact "5" of the Administrative Law Judge's determination to read as follows:

> The business terms governing Genesee's sale of product to its distributors are governed by Genesee's standard Distributor Agreement (sometimes, "the Agreement"). Genesee ships cases of either bottles or cans and individual kegs on wooden pallets. The wooden pallets are constructed to specific dimensions and can only be used with Genesee's palletizer equipment. Provisions of the

> Agreement set forth, in pertinent part, that the term "Container" contemplates and includes cooperage[1] (e.g., kegs), pallets and cases.[2]

Genesee uses three types of pallets. One kind is used for cases of bottles and cans and two different kinds are used for kegs. Pallets used to ship cases of cans or bottles are 5 inches high by 35 inches wide by 39 inches long. These pallets weigh approximately 47 pounds each. Genesee's name, in one inch high letters, is stamped in ink on each such pallet. Pallets used to ship kegs are 4.75 inches deep by 33 inches wide by 34 inches long and weigh approximately 27 pounds each. The pallets used to ship kegs do not bear Genesee's name.

Genesee's product is shipped on the pallets to its ultimate destination. Where Genesee uses its own trucks to ship product to purchasers in Monroe County, the pallets do not remain with the purchaser of the product. In all other cases, the pallets do remain with the purchaser.

Section 5 of Genesee's standard Distributor Agreement provides:

> (a) Distributor shall pay Brewery a deposit for all cooperage, pallets, cases and returnable bottles in an amount and in accordance with such terms as may be established from time to time by Brewery. Brewery may, in addition, maintain a cooperage control report or other records showing cooperage delivered to Distributor and cooperage returned to Brewery by Distributor. Brewery may from time to time charge Distributor at then current memorandum rates for all cooperage deemed to be lost by reason of a comparison between the amount of cooperage shown on Brewery's control report for Distributor, and cooperage actually at Distributor's premises and on Distributor's customers' premises. Distributor shall promptly pay such charges. Deposit charges and memorandum rates shall be at the following amounts unless and until changed by Brewery:
>
> DEPOSIT CHARGE: Hoff Stevens and Sankey: ½ Barrel - $10.00; ¼ Barrel - $10.00
>
> MEMORANDUM RATE: Hoff Stevens: ½ Barrel - $55.00; ¼ Barrel - $45.00

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[1]"Cooperage" refers to wooden casks or tubs for draft beer or bulk wine (***see***, Webster's Third New International Dictionary 501[1986]) although Genesee now uses aluminum kegs.

[2]We have modified finding of fact "5" to more fully reflect the record.

Sankey: ½ Barrel - $70.00; ¼ Barrel - $65.00

(b) *Distributor shall* promptly *recover empty* cooperage, cases, *pallets* and returnable bottles from Distributor's customers *and return them to Brewery* as expeditiously as possible. Each case returned to Brewery by Distributor shall contain returnable bottles of size, shape and characteristics of those used by Brewery, sorted by size, shape and color. Brewery shall not be obligated to accept, return, or provide any credit or refund for any bottles, cooperage, pallets or dust covers which cannot be identified *as its own*. Upon receipt of returned empty cooperage, pallets, cases and returnable bottles, Brewery shall credit Distributor's account, or refund to Distributor in cash the deposit made with respect thereto, after deducting any charges assessed by Brewery for handling any foreign cooperage, cases or bottles or any improperly sorted cooperage, cases or bottles (emphasis added).

We modify finding of fact "9" of the Administrative Law Judge's determination to read as follows:

> Genesee collects a deposit of $10.00 for each pallet that is transferred to a distributor. The amount is established by oral agreement between Genesee and the distributor and is not contained in the Distributor Agreement or any other written agreement. The deposit amount is based on the industry standard and is intended to reflect Genesee's actual cost. However, paragraph (3)(c) of the Argeement provides, in pertinent part, that deposit charges are subject to change by petitioner in its sole discretion, at any time, and without notice.[3]

During the audit period, some of Genesee's pallets from as far away as California were returned by distributors.

We modify finding of fact "11" of the Administrative Law Judge's determination to read as follows:

> If a distributor returns one of petitioner's pallets undamaged, its deposit is refunded or credited to the distributor. Paragraph 11(c) of the Agreement provides, in pertinent part, that in case of loss, damage or destruction to pallets after delivery to the distributor, the distributor is liable for the replacement value. "Any monies, including deposits, held by Brewery for Distributor's account for any reason may be credited by Brewery against the replacement value of such

[3]We have modified finding of fact "9" by adding the last sentence to more accurately reflect the record.

> lost, damaged or destroyed containers" (Agreement, ¶ 11[c]). During the audit period, a majority of Genesee's pallets were returned.[4]

Deposits are refunded only upon the return of the petitioner's pallets.[5]

Genesee's standard Distributor Agreement makes the distributor liable for any difference between Genesee's actual replacement or repair costs for pallets and the industry standard deposit price. Petitioner does not always charge distributors for such difference. During the audit period, Genesee's average cost per pallet was $10.70.

Genesee has never initiated legal action against a distributor to repossess a pallet.

Genesee expenses the cost of the pallets for Federal and New York State income tax purposes.

Genesee maintains records of pallets shipped to and returned by each distributor. For accounting purposes, Genesee treats a pallet deposit collected from a distributor as a deposit liability until such time as the deposit is returned to or forfeited by the distributor. Genesee does not report deposits as revenue for tax and accounting purposes.

We modify finding of fact "17" of the Administrative Law Judge's determination to read as follows:

> Genesee provides incentives to its employees to identify non-Genesee pallets returned to Genesee, since Genesee palletizers will work only with Genesee's pallets. The Agreement also permits Genesee to assess a penalty against a distributor for handling charges arising from the distributor's return of containers not belonging to petitioner (***see***, Agreement, ¶ 5[b]).[6]

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[4]We have modified finding of fact "11" more fully reflect the record.

[5]We have modified finding of fact "12" by adding the word petitioner's to clarify that refunds only apply to the return of petitioner's pallets.

[6]We have modified finding of fact "17" to more fully set forth the record.

Genesee did not collect sales tax on pallet deposits.

Genesee also collects deposits on all kegs and returnable bottles.

As with deposits for pallets, if a distributor returns a bottle, its deposit is refunded; if a bottle is not returned, Genesee will keep the deposit.

The deposit system for kegs is different from the system used for pallets and bottles. Pursuant to the Distributor Agreement, Genesee charges a deposit of $10.00 for each keg that is shipped full to a distributor, which deposit price does not and is not intended to reflect Genesee's actual cost. Genesee's average cost per keg during the audit period was $83.00.

If a distributor returns a keg, its deposit is refunded. However, under the Distributor Agreement, if a keg is not returned, Genesee will retain the deposit and charge the distributor an additional penalty (the "Memorandum Rate"), which varies depending upon the type of keg. The average Memorandum Rate during the audit period was $58.75. Genesee does not charge a Memorandum Rate if a distributor fails to return a pallet.

During the audit period, the average cost (not including bottle deposit) to a distributor of a case of bottled beer was $8.00.

Pallets are used to ship 56 cases of bottles (a "bottle load").

During the audit period, the average cost (not including pallet or bottle deposits) to a distributor of a bottle load was $448.00.

During the audit period, the average cost (not including keg deposit or Memorandum Rate) to a distributor of a keg full of Genesee's product was approximately $30.00.

Pallets are used to ship 4 kegs of Genesee beer (a "keg load").

During the audit period, the average cost (not including pallet deposit, keg deposit or Memorandum Rate) to a distributor of a keg load was $120.00.

Genesee concedes that its keg purchases are subject to sales tax.

We find an additional finding of fact to read as follows:

> The Agreement requires distributors to maintain insurance coverages in amounts determined by Genesee. This requirement includes adequate fire, theft and casualty insurance on containers in the distributor's possession. In the case of fire, theft or casualty, the distributor must reimburse Genesee for, *inter alia*, the replacement cost of kegs, cases, pallets and bottles less deposit amounts (***see,*** Agreement, ¶ 10[a][iii]). The Agreement also provides that upon termination of the Agreement, the distributor is required to *immediately* return to Genesee all undamaged empty containers (***see,*** Agreement, ¶ 13[h]).

Genesee uses stoppers, called bungs, to seal the holes in kegs through which the kegs are filled with Genesee's product.

Bungs are designed for one-time use, and when kegs are returned to Genesee, the bungs must be removed and discarded so that the kegs can be cleaned and refilled for their next use.

Each time a keg is filled with Genesee's product, a new bung is inserted.

Genesee's average cost per bung during the audit period was 9.7 cents. Genesee did not impose a separate charge for bungs when Genesee furnished a distributor with a full keg.

The Division conducted a sales tax field audit of Genesee's records for the period December 1, 1994 through August 31, 1997. The Division issued to Genesee a Notice of Determination (number L-001693482) asserting sales tax due in the amount of $86,815.83 on Genesee's purchases of pallets and bungs.

The Division determined that sales tax of $68,915.67 is due on Genesee's purchases of pallets. If the Division of Tax Appeals determines that the purchases of pallets are not subject to sales tax, the Notice of Determination should be reduced by that amount.

The Division determined that sales tax of $17,900.16 is due on Genesee's purchases of bungs. If the Division of Tax Appeals determines that the purchases of bungs are not subject to sales tax, the Notice of Determination should be reduced by that amount.[7]

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge noted that, pursuant to the Tax Law, a sales tax is imposed on the receipts from every retail sale of tangible personal property, except as otherwise provided. As all sales of tangible personal property are presumptively subject to tax, the burden is on the petitioner to show its entitlement to an exemption.

The Administrative Law Judge observed that Tax Law § 1115(a)(19) provides an exemption from the sales tax for "packaging materials and supplies" used by a vendor in packing tangible personal property for sale, "and actually transferred by the vendor to the purchaser."

The Administrative Law Judge noted that pallets are specifically included in the regulatory definition of packaging material. Moreover, the Administrative Law Judge found that there was clearly a physical transfer of the pallets from Genesee to its distributors, with the exception of products delivered within Monroe County.

The Administrative Law Judge, in considering whether Genesee maintained ownership of the pallets after they were transferred to the distributors, concluded that the charging of a refundable deposit for property physically transferred to the vendee was insufficient by itself to establish that ownership of the property remained with the vendor. The Administrative Law Judge determined that Genesee's pallet deposit is indistinguishable from the bottle deposit

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[7]At the request of both parties, official notice is taken of the record of proceeding in ***Matter of Nehi Bottling Co. v. Gallman*** (39 AD2d 256, 333 NYS2d 824, ***affd*** 34 NY2d 808, 359 NYS2d 44) filed in the Appellate Division, Third Department.

described in ***Nehi Bottling***. Thus, applying the reasoning of ***Nehi Bottling*** to Genesee's transactions with its distributors, the Administrative Law Judge concluded that Genesee's collection of a deposit on all pallets transferred to its distributors does not establish that ownership of the pallets remained with Genesee. Under the reasoning of ***Nehi Bottling***, the Administrative Law Judge stated, some separate agreement or understanding is necessary to show that Genesee retained ownership of the pallets.

The Administrative Law Judge rejected the Division's argument that paragraph 5(b) of the Distributor Agreement evidences Genesee's continued ownership of the pallets even after their transfer to the distributors. The Administrative Law Judge concluded, without discussing the impact of Tax Law § 1115(a)(19) itself, that the substance of the transaction between Genesee and its distributors supports treating the pallets as "actually transferred" to the distributors. With the incentive supplied by the deposit system, the Administrative Law Judge said, a majority of the pallets are returned, although the distributors have no legal obligation to return the pallets. The Administrative Law Judge determined that the pallets more closely resemble the bottles described in section 528.20(b)(4) of the regulations than the kegs of beer also described there.

The Administrative Law Judge also rejected the Division's argument that the placement of Genesee's name on the pallets created a presumption that ownership of the pallets did not change hands. The Administrative Law Judge pointed out that in ***Nehi Bottling***, the name "Nehi" was embossed on each bottle. The Appellate Division did not find this a significant factor in determining ownership of the bottles. Further, the Administrative Law Judge noted, Genesee's name was stamped only on the pallets used to deliver cases of bottles and cans and not on those

used to deliver kegs.[8] Accordingly, the Administrative Law Judge held Genesee's purchases of the pallets to be exempt from sales tax.[9]

The Administrative Law Judge also concluded that the bungs qualify for the packaging exemption, stating that bungs constitute packaging material similar to the lid of a box, the cap on a soda bottle or the cork in a wine bottle. No charge of any kind is made for the bung, and the charges made for the keg do not include the value of the bung. Accordingly, the Administrative Law Judge concluded the bungs are exempt from sales tax.

Since the Administrative Law Judge determined that Genesee's purchases of pallets and bungs were exempt from the imposition of sales tax, she did not consider Genesee's alternative argument: whether they qualify for the resale exclusion.

ARGUMENTS ON EXCEPTION

The Division argues that Genesee is not entitled to the exemption for packaging materials. The Division urges that the Administrative Law Judge misapplied the decision in ***Nehi Bottling***, since the facts in that case are distinguishable from those here. Further, the Division notes, the Court's decision in ***Nehi Bottling*** was issued before the exemption and regulations in dispute here were enacted. The Division points out that Tax Law § 1115(a)(19) and the regulations promulgated thereunder provide no exemption for reusable, costly containers which are returned to the vendor for refilling. The Division also urges that petitioner's customers are not free to dispose of the pallets as they see fit and, therefore, that the pallets are not "actually transferred"

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[8]The reason why the name is not placed on pallets used to deliver kegs is not in the record.

[9]This conclusion does not apply to the use of pallets by Genesee to deliver its product to its own customers in Monroe County.

to the customers. Finally, the Division argues that the bungs are an integral component of the kegs and, as such, they are not exempt from sales tax.

Regarding the issue involving the resale exclusion, the Division argues that Genesee purchased the pallets and bungs for its own use and never sold them to its customers.

Genesee argues, as it did below, that its purchases of pallets and bungs are exempt from the imposition of sales tax pursuant to Tax Law § 1115(a)(19), which provides an exemption from sales tax on retail sales of cartons, containers and other packaging materials which are used and consumed by a vendor in packaging or packing tangible personal property for sale. In the alternative, Genesee claims that the pallets and bungs were purchased for resale.

OPINION

Under Tax Law § 1105(a), sales tax is imposed upon "[t]he receipts from every retail sale of tangible personal property, except as otherwise provided in this article." All sales of tangible personal property are presumptively subject to tax pursuant to Tax Law § 1132(c)(1) "until the contrary is established."

Exemptions from tax are strictly construed (***Matter of Grace v. New York State Tax Commn., supra***). When the issue to be decided is whether the taxpayer is entitled to an exclusion or an exemption from tax, the taxpayer is required to prove that its interpretation of the statute is the only reasonable interpretation or that the Division's interpretation is unreasonable (***Matter of Grace v. New York State Tax Commn.***, ***supra***; ***Matter of Blue Spruce Farms v. New York State Tax Commn***., 99 AD2d 867, 472 NYS2d 744, ***affd*** 64 NY2d 682, 485 NYS2d 526). These principals of statutory construction also apply to the interpretation of regulations (***see, Matter of Cortland-Clinton, Inc. v. New York State Dept. of Health***, 59 AD2d 228, 399 NYS2d

492). The burden of proof to show entitlement to an exemption is on the petitioner (***Matter of Young v. Bragalini***, 3 NY2d 602, 170 NYS2d 805; ***Matter of Surface Line Operators Fraternal Org. v. Tully***, 85 AD2d 858, 446 NYS2d 451; 20 NYCRR 3000.15[d][5]).

Tax Law § 1115(a)(19) provides a list of items of tangible personal property the purchase of which is exempt from the imposition of sales tax, including:

> Cartons, containers, and wrapping and packaging materials and supplies, and components thereof *for use and consumption by a vendor in packaging or packing* tangible personal property for sale, and *actually transferred* by the vendor to the purchaser.

The Division's regulations, in pertinent part, provide:

> The sale of cartons, containers, and wrapping and packaging materials . . . for use and consumption by a vendor in packaging or packing tangible personal property for sale, and *actually transferred by the vendor to the purchaser*, is exempt from sales and use tax.
>
> > Example 1: A manufacturer sells goods in bulk and ships them in corrugated cardboard cartons to a retailer. The retailer after using the cartons as temporary storage and containers removes the goods and discards the cartons. The cartons are not subject to tax (20 NYCRR 528.20[a][1], emphasis added).

The term "*Packaging material* includes, but is not limited to: bags, barrels, baskets, binding, bottles, boxes . . . cartons . . . crates . . . kegs . . . pallets . . . and wrapping paper *actually transferred* with the product to the purchaser" (20 NYCRR 528.20[b][1], emphasis added). A *purchaser*, for purposes of this regulation, is "any person purchasing tangible personal property from a vendor, whether or not he is the ultimate consumer" (20 NYCRR 528.20[b][3]).

The term *"actually transferred* means that the packaging material is physically transferred to the purchaser, *for whatever disposition the purchaser wishes.*

> Example 1: A returnable soda bottle may be returned for a refund of deposit or disposed of otherwise. Such a bottle is actually transferred to the purchaser and may be purchased without payment of tax" (20 NYCRR 528.20[b][4], second emphasis added).

However, returnable containers purchased at retail by a person who does not transfer ownership of the container are subject to tax. "*Title* to the container *remains in the seller when possession* of the container *is transferred to one who purchases commodities* contained therein *and then returns the container* to the seller *for refilling* (20 NYCRR 528.20[c][1], emphasis added). "Cartons or other packaging materials purchased by a vendor for his own use or consumption are subject to tax" (20 NYCRR 528.20[c][2]). The Tax Law defines "use" as "[t]he exercise of any right or power over tangible personal property . . . by the purchaser thereof, and includes, but is not limited to, the receiving, storage or any keeping or retention for any length of time, withdrawal from storage . . . or any consumption of such property" (Tax Law § 1101[b][7]; ***Matter of Sunshine Developers v. State Tax Commn.***, 132 AD2d 752, 517 NYS2d 317, ***lv denied*** 70 NY2d 609, 522 NYS2d 109).

Both petitioner and the Division urge that the facts in this case are very similar to those in ***Matter of Upstate Farms Coops.*** (Tax Appeals Tribunal, May 2, 2002 [wherein we held that the purchase of milk crates used to deliver the petitioner's milk and milk products was not exempt from sales tax as packaging material since the milk crates were not actually transferred to its customers]). Both cases involve sturdy, expensive (when compared to a soda bottle) containers or packaging; in both cases, the containers or packaging were returned to the provider of the products for re-use in providing their product. In both cases, a refundable deposit was charged to

the customer which was less (the cost per pallet is $.70 less than the deposit amount) than the cost of the container or packaging.

However, there are also significant differences in the facts between the two cases. In ***Upstate Farms***, there was no contract between the parties. The relationship between Upstate and its customers insofar as the pallets were concerned, was governed by regulations of the New York State Department of Agriculture and Markets. Those regulations set forth the amount of the deposits to be paid as well as ownership of the milk crates that were transferred to Upstate's customers.

In this matter, a written contract governs the relationship of the parties.

Genesee argues that the Administrative Law Judge properly relied on the decision in ***Nehi Bottling*** in finding for petitioner below. We disagree. We have facts herein not present in ***Nehi.*** The crucial element missing in ***Nehi*** was that there was no evidence in the record to support the Division's argument that Nehi retained ownership of the bottles or other items that had been transferred to Nehi's customers.

The Appellate Division in ***Nehi Bottling*** quoted the Court of Appeals in ***People v. Cannon*** (139 NY2d 32, 49-50) stating:

> The taking of security for the return of the bottles from the party to whom they were delivered, *so long as there is no evidence of an agreement* and the party is *under no legal obligation to return them* . . .amounts in law to a sale (***Matter of Nehi Bottling Co. v. Gallman, supra,*** 333 NYS2d, at 825, emphasis added).

For the following reasons, we find ***Nehi Bottling*** distinguishable on its facts. In the instant case, there *is* an "agreement" in evidence that: a) creates a duty on the part of distributors to collect and return the pallets to petitioner "as expeditiously as possible" (Agreement, ¶ 5[b]); b)

requires distributors to insure petitioner's pallets in their possession and *reimburse petitioner for the replacement cost* of pallets in the event of fire, theft or casualty (***see,*** Agreement, ¶ 10[a][iii]); c) requires distributors to reimburse petitioner for the replacement value of lost, damaged or destroyed pallets, *inter alia*, after they have been delivered to distributors (***see,*** Agreement, ¶ 11[c]); d) upon termination or non-renewal of the Agreement, distributors "*shall immediately*" return to petitioner or its designee*, "all undamaged empty containers"* for credit of aggregate outstanding deposit refunds or credit (Agreement, ¶ 13[h], emphasis added). These provisions establish petitioner's continuing ownership of the pallets even after they are delivered to its distributors. It follows that there is no "actual transfer" of the pallets to petitioner's distributors within the meaning of Tax Law § 1115(a)(19).

We find the legislative history, as reflected in the bill jacket of Chapter 581 of the Laws of 1974, instructive in this analysis. In the sponsor's memorandum in support of this legislation, which, among other things, enacted the exemption from tax contained in Tax Law § 1115(a)(19), it is stated, in pertinent part, that: "[t]he exemption would be limited to packaging materials actually transferred to the purchaser. *No exemption would exist, therefore, for durable, costly containers returned to the vendor for refilling*" (L 1974, ch 581, p. 9, Governor's Bill Jacket, emphasis added). Nearly identical language was included in the Governor's message approving this legislation. It is clear from this language that the Legislature and the Governor did not intend that the subject exemption should extend to durable, returnable packaging or containers such as the pallets involved here. We perceive a significant difference between pallets, which are relatively expensive, durable, returnable, packaging materials, and soda bottles. We disagree with the Administrative Law Judge that, based on the decision in ***Nehi***, the treatment of bottles

and pallets as packaging materials are analogous. ***Nehi Bottling*** was decided before the exemption at issue here was enacted in Tax Law § 1115(a)(19), so any analysis of the facts here cannot be in a vacuum, but must also include proper consideration of the statute's requirements. Further, the similarities perceived by petitioner and the Administrative Law Judge between the facts here and in ***Nehi Bottling*** are rendered irrelevant in view of the requirements placed on distributors by the above referenced contractual provisions.[10]

Our conclusion that petitioner did not actually transfer the cases to its customers is based upon petitioner's Agreement with its distributors. We find the following as indicia of petitioner's continued ownership of the pallets: (1) Petitioner maintains records of the number of pallets in the possession of its distributors. As we stated in ***Matter of Upstate Farms Coops.*** (***supra***), it is counterintuitive for petitioner to keep an inventory of personal property owned by someone else; (2) The Agreement requires distributors to recover empty pallets and return them to petitioner as expeditiously as possible (***see,*** Agreement, ¶ 5[b]); (3) the Agreement only obligates petitioner to give credit or refunds with respect to and, accept the return of, pallets identifiable "as its own" (Agreement, ¶ 5[b]); (4) in case of loss, damage or destruction to containers, including pallets, the "Distributor shall be liable for the replacement value thereof" (Agreement, ¶ 11[c]); (5) distributors shall maintain adequate fire, theft and casualty insurance on Genesee's products and containers, including pallets, in the distributor's possession. The distributor must, in the event of loss, pay Genesee the full replacement cost of all containers, including pallets, less applicable deposits (***see,*** Agreement, ¶ 10[a][iii]); (6) upon termination or

[10]We also view as error the Administrative Law Judge's reliance on the reasoning in two advisory opinions, both of which were based on "assumed" facts of non-party taxpayers, especially since those assumed facts are at odds with the facts in this record.

non-renewal of the Agreement, the Distributor "shall immediately return to" petitioner "all undamaged empty containers" which, as defined in the Agreement, includes pallets (Agreement, ¶ 13[h]).

We conclude that petitioner, like the petitioner in ***Upstate Farms***, purchases containers (i.e., pallets) for *its use* in delivering its product to its customers. The pallets are emptied and then returned to petitioner to be refilled and re-used in delivering products to its distributors. Such durable, reusable, refillable containers are not the type of containers contemplated by the exemption provisions in Tax Law § 1115(a)(19) and 20 NYCRR 528.20(a)(1) (***see, Matter of Upstate Farms Coops., supra***).

We conclude that the reusable, returnable pallets are devices used to facilitate delivery of petitioner's beer products (***see,*** 20 NYCRR 528.20[c][3]) and were subject to sales tax as purchases for petitioner's own use and consumption (***see,*** 20 NYCRR 528.20[c][2]) and not exempt as "packaging materials" within the meaning of Tax Law § 1115(a)(19).

We next address the issue of whether petitioner's purchases of pallets are exempt from sales tax as purchases for resale pursuant to Tax Law § 1101(b)(4).[11]

The sales tax is imposed upon "[t]he receipts from every retail sale of tangible personal property" except as otherwise provided by Article 28 of the Tax Law (Tax Law § 1105[a]). A "retail sale" is defined, in pertinent part, as a "sale of tangible personal property to any person for any purpose, other than (A) for *resale as such* . . . ." (Tax Law § 1101[b][4][i][A], emphasis

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[11]As in ***Matter of Upstate Farms Coops.*** (***supra***), the resale issue was deemed moot by the Administrative Law Judge, and, as here, neither party has taken exception to the failure to address that issue. In any event, the Appellate Division remanded ***Upstate Farms*** to the Tax Appeals Tribunal for a decision on whether petitioner's purchases of milk crates (in that case) were exempt from sales tax as purchases for resale (Tax Law § 1101[b][4]). To avoid a similar remand in this matter, we will decide the sales for resale issue based on the arguments and briefs presented below.

added). There is a statutory presumption that all receipts for property or services are subject to tax and the burden to prove otherwise rests with the taxpayer (Tax Law § 1132[c][1]; ***see, Matter of Savemart, Inc. v. State Tax Commn.***, 105 AD2d 1001, 482 NYS2d 150, ***appeal dismissed*** 64 NY2d 1039, 489 NYS2d 1029).

Petitioner maintains that its purchases of pallets are for "resale as such" to its distributors and, thus, exempt from tax under Tax Law § 1101(b)(4)(i)(A). The Court of Appeals has held that an item is purchased exclusively for resale, for purposes of Tax Law § 1101, when the purchaser acquires the item for the purpose of resale (***see, Matter of Albany Calcium Light Co. v. State Tax Commn.***, 44 NY2d 986, 408 NYS2d 333; ***Matter of Valley Welding Supply Co. v. Chu,*** 131 AD2d 917, 516 NYS2d 366; ***Micheli Contr. Corp. v. New York State Tax Commn.***, 109 AD2d 957, 486 NYS2d 448). Any resale which is purely incidental to the primary purpose of the business is not a purchase for resale as such (***see, Matter of Custom Mgt. Corp. v. New York State Tax Commn.***, 148 AD2d 919, 539 NYS2d 550; ***Matter of Laux Advertising v. Tully***, 67 AD2d 1066, 414 NYS2d 53). Thus, if petitioner's "sales" of the pallets are incidental to its primary purpose of packaging and the delivery of beer products, its purchases of pallets would not be for "resale as such."

Section 1101(b)(5) of the Tax Law defines "Sale, selling or purchase," in pertinent part, as "[a]ny transfer of title or possession or both . . . rental, lease or license to use or consume . . . by any means whatsoever *for a consideration* . . ." (emphasis added). The Tax Law does not separately define a "resale." "It appears then that the Legislature does not consider a sale and resale as discrete concepts and thus a purchaser who acquires an item for the purpose of sale or rental . . . purchases it for resale within the meaning of the statute" (***Matter of Albany Calcium***

Light Co. v. State Tax Commn., ***supra***, 408 NYS2d, at 334). In ***Albany Calcium Light***, the petitioner used cylinders to deliver gas to its customers and charged a demurrage fee when customers retained gas cylinders beyond a certain time period. The Court of Appeals found that petitioner did not acquire the cylinders with the expectation of collecting these fees, which were purely *incidental to its primary business of selling gas* to its customers, and held that the petitioner's original purchase of metallic cylinders was not for resale as such, and not exempt from sales tax as a purchase for resale (***see, Matter of Albany Calcium Light Co. v State Tax Commn., supra***).

We have found that: (i) petitioner *uses* and reuses the pallets to deliver its beer; (ii) based on the Agreement's provisions recited above, petitioner retains ownership of the pallets that are in the distributors possession; (iii) the majority of these pallets are recovered by petitioner for further use in providing beer to its distributors; (iv) the deposit charges were not included as revenue to petitioner or in the gross sales reported by petitioner in its filed sales tax returns; and (v) at the termination of the Agreement, all pallets must be returned to petitioner.

Based on these factors, we conclude that petitioner did not purchase pallets solely for the purpose of resale as such. This conclusion is buttressed by the fact that petitioner uses and re-uses the pallets in delivering its beer, and all pallets must be returned to petitioner at termination of the contract. Taken together, these facts evidence petitioner's continuing ownership of the pallets and militates against a conclusion that petitioner's purchases of pallets is for resale. We note that as in ***Upstate Farms***,[12] petitioner is not in the business of selling pallets, it is in the business of selling beer. To the extent that pallets are provided to petitioner's distributors, it is

[12]Upstate Farms was in the business of selling milk.

incidental to petitioner's primary business purpose of selling beer (***Matter of Upstate Farms Coop.*** Tax Appeals Tribunal, May 2, 2002; ***Matter of Albany Calcium Light Co. v. State Tax Commn., supra***).

Finally, section 1101(b)(5) of the Tax Law defines a sale, in pertinent part, as "[a]ny transfer of title or possession or both . . . rental, lease or license . . . by any means whatsoever *for a consideration* . . . ." While petitioner provided the subject pallets to its distributors when making beer deliveries, we find no "consideration" for the transfer of the pallets. As already noted, petitioner does not include the alleged sale of pallets in its revenues, nor does it report such "sales" on its filed sales tax returns. The distributors pay a refundable deposit to secure the pallets' return to petitioner, not "in consideration" for the temporary transfer. It is particularly significant, in this regard, that at the termination of the agreement all pallets must be returned to petitioner for refund.

Similarly, with respect to the bungs, there is no separately stated consideration paid in the record. Accordingly, we conclude that the bungs are not purchased for "resale as such" (Tax Law § 1101[b][4][i][A]; [5]).

We now address whether the bungs are exempt from sales tax as packaging materials. We affirm the Administrative Law Judge on this issue. Tax Law § 1115(a)(19) provides a list of items of tangible personal property the purchase of which is exempt from the imposition of sales tax.

We find that the bungs constitute packaging materials and supplies within the intent of the statute. They are used by petitioner one time and discarded if returned with a keg. They are essentially consumed by Genesee in packaging its beer for sale. The contract does require their

return and no monies are assessed by petitioner for the failure to return them. We conclude petitioner's purchase of bungs is exempt from sales tax pursuant to Tax Law § 1115(a)(19). The sales tax of $17,900.16 plus applicable interest, assessed on petitioner's purchase of bungs is canceled.

Accordingly, it is ORDERED, ADJUDGED, and DECREED that:

1. The exception of the Division of Taxation is granted to the extent that the purchases of pallets are not exempt from sales tax, but is otherwise denied;

2. The determination of the Administrative Law Judge is reversed to the extent indicated in paragraph "1" above, but in all other respects is affirmed;

3. The petition of Genesee Brewing Company, Inc. is granted to the extent indicated in paragraph "1" above, but is otherwise denied; and

4. The Notice of Determination No. L-001693482 is modified to the extent that the sales tax assessed on the bungs is canceled, but is otherwise sustained.

DATED: Troy, New York
May 9, 2002

/s/Donald C. DeWitt
Donald C. DeWitt
President

/s/Carroll R. Jenkins
Carroll R. Jenkins
Commissioner

/s/Joseph W. Pinto, Jr.
Joseph W. Pinto, Jr.
Commissioner