

Cite as Det. No. 14-0247, 34 WTD 109 (2015)

BEFORE THE APPEALS DIVISION  
DEPARTMENT OF REVENUE  
STATE OF WASHINGTON

In the Matter of the Petition for Correction of ) D E T E R M I N A T I O N  
Assessment of )  
 ) No. 14-0247  
 )  
... ) Registration No. . . .  
)

[1] RCW 82.21.020; RCW 82.23A.010: HAZARDOUS SUBSTANCE TAX – PETROLEUM PRODUCTS TAX – AVIATION FUEL. Aircraft are required to pay hazardous substance tax and petroleum products tax on the fuel burned within Washington.

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.

Lewis, A.L.J. – Taxpayer protests the Hazardous Substance Tax (“HST”) and Petroleum Products Tax (“PPT”) assessed on aviation fuel consumed in Washington, which was either purchased within Washington, or purchased elsewhere and brought into Washington in the fuel tanks of Taxpayer’s aircraft. Taxpayer maintained that it did not owe the tax because it was not the first possessor of the fuel. We sustain the tax assessed.

ISSUE:

Under the provisions of RCW 82.21.020 and RCW 82.23A.010 does Taxpayer owe tax on the aviation fuel it burns within Washington?<sup>1</sup>

FINDINGS OF FACT:

Taxpayer operates a passenger and cargo airline businesses. Taxpayer flies its aircraft into Washington to drop off and pick up passengers and cargo. Taxpayer began flight operations into Washington during 2008. Prior to 2008, Taxpayer had no commercial operations within Washington. During April 2012, the Department sent Taxpayer a “Washington Business Activities Questionnaire”. Taxpayer replied that it was already registered with the Department.<sup>2</sup> The Department’s Compliance Division and Taxpayer discussed possible tax liability and its

<sup>1</sup> Washington suspended collection of the Petroleum Products Tax on April 1, 2010, based on the balance that had accumulated in the pollution liability insurance program trust account. *See*, RCW 82.23A.020(4); March 11, 2010 Department of Revenue Special Notice entitled “Petroleum Products Tax Suspension”.

<sup>2</sup> The Department’s records show that Taxpayer registered with the Department during 1988.

calculation. The discussion centered on the use tax liability on food and beverage items consumed while in Washington, and use tax, HST, and PPT due on aviation fuel burned while in Washington.

Taxpayer's aircrafts' fuel tanks contain aviation fuel that is burned when flying within Washington. Aviation fuel purchased outside Washington is burned when the aircraft fly into Washington. The aircraft refuel in Washington. Thus, the aviation fuel that the aircraft burn on departure from Washington is a mixture of fuel that was in the tank when landing in Washington, as well as fuel that was purchased in Washington. Taxpayer also loads food and beverage items onto aircraft before departure from Washington, a small portion of which is consumed within Washington.

Taxpayer cooperated with the Department in providing calculations of the food, beverage, and fuel consumed within Washington. On December 11, 2013, the Department issued a \$. . . assessment.<sup>3</sup> Taxpayer disagreed with the assessment of HST and PPT on fuel burned in Washington. On February 7, 2014, Taxpayer filed a petition with the Appeals Division requesting cancellation of the HST and PPT tax assessments. Taxpayer maintained it did not owe tax because payment of the HST and PPT tax fall on the first possessor of the products within Washington, which was the refinery, distributor, or retail vendor.

#### ANALYSIS:

This appeal concerns Taxpayer's burning of aviation fuel within Washington. Aviation fuel is a . . . petroleum product that is subject to both the HST (RCW 82.21.020(2) and PPT (RCW 82.23A.010(1)). Washington law imposes a HST on "the privilege of possession of hazardous substances in this state." RCW 82.21.030. Similarly, Washington law imposes a PPT on "the privilege of possession of petroleum products in this state." RCW 82.23A.020. The intent of both laws is to collect the tax from the first possessor in Washington. RCW 82.21.010 and RCW 82.23A.005. HST and PPT are both calculated by multiplying the wholesale value of the substance by a tax rate. RCW 82.23A.020 and RCW 82.21.030.

Taxpayer's appeal does not challenge that the aviation fuel is subject to both the HST and PPT. RCW 82.21.020(1)(b); RCW 82.23A.010(1). Rather, the controversy centers on the whether the incidence of the tax falls on Taxpayer.

Because the HST and PPT tax liability is triggered by first possession in Washington,<sup>4</sup> HST and PPT may be due on fuel brought into Washington in the tanks of aircraft, as well as the fuel it takes delivery of in Washington. Washington law recognizes that only a portion of the fuel will be consumed in Washington. Washington only taxes the portion of the fuel consumed in Washington. To make tax reporting easier, the law provides a fuel-in-tank credit for fuel not consumed in Washington.<sup>5</sup> RCW 82.21.050(1) provides the credit:

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<sup>3</sup> The \$. . . assessment consisted of \$. . . tax, \$. . . interest, \$. . . delinquent return penalty and \$. . . assessment penalty.

<sup>4</sup> RCW 82.21.010 & .040(1); RCW 82.23A.005 & .030(1).

<sup>5</sup> [The hazardous substance tax applies to jet fuel consumed in flights arriving in Washington from out of state between the time the aircraft crosses the Washington border and the time it lands because the taxpayer possessed and consumed the fuel in Washington. Det. No. 99-215, 19 WTD 817 (2000). The hazardous substance tax applies

[S]hall be allowed in accordance with rules of the department of revenue for taxes paid under this chapter with respect to fuel carried from this state in the fuel tank of any airplane, ship, truck, or other vehicle.

*See also* RCW 82.23A.040(1). WAC 458-20-252(5)(b) (“Rule 252”) addresses the fuel-in-tank credit.<sup>6</sup> In order to avoid the need for vendors to file amended tax returns to account for fuel products that end up subject to the credit, sellers may take exemption certificates from buyers. With respect to who is entitled to use the credit, Rule 252(5)(b)(vii) states:

This certificate may be executed and provided to any possessor of fuel in this state, throughout the chain of distribution, with respect to fuel which ultimately will be sold and delivered into any carrier's fuel tanks in this state. Thus, refiners or manufacturers will take such certificates directly from carriers or from their wholesale purchasers who will sell to such carriers. Similarly, fuel dealers and distributors will take such certificates from carriers to whom they sell such fuel. These certificates must be retained as a permanent part of such seller's business records.

(Emphasis added.)

In the absence of the certificate provisions, a vendor would become liable for payment of the tax at the time that a hazardous substance is withdrawn from storage for sale, transfer, remanufacture, or consumption. Rule 252(8).

Rule 252(5)(b)(iii) states that the “fuel-in-tank” credit will be used primarily by interstate or foreign private or common carriers either carrying fuel into Washington or purchasing fuel in Washington.<sup>7</sup>

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to fuel consumed in Washington when the fuel is transported from other states into Washington or purchased in Washington. Det. No. 97-17, 16 WTD 211 (1997).

<sup>6</sup> RCW 82.23A.040 is the statutory authority for the fuel-in-tank credit.

<sup>7</sup>(b) A credit may be taken in the amount of the hazardous substance tax upon the value of fuel which is carried from this state in the fuel tank of any airplane, ship, truck, or other vehicle.

- (i) The credit may be claimed only for the amount of tax reported or actually due to be paid on the fuel, not the amount representing the value of the fuel.
- (ii) The purpose of this credit is to exclude from taxation any possessions of fuel which remains in the fuel tanks of any carrier vehicles powered by such fuel when they leave this state, regardless of where or from whom such fuel-in-tanks was acquired.
- (iii) The nature of this credit is such that it generally has application only for interstate and foreign private or common carriers who carry fuel into this state and/or purchase fuel in this state. The intent is that the tax will apply only to so much of such fuel as is actually consumed by such carriers within this state.
- (iv) In order to equitably and efficiently administer this tax credit, any fuel which is brought into this state in carrier vehicle fuel tanks must be accounted for separately from fuel which is purchased in this state for use in such fuel tanks. Formulas approved by the department for reporting the amount of fuel consumed in this state for purposes of this tax or other excise tax purposes will satisfy the separate accounting required under this subsection.
- (v) Fuel-in-tanks brought into this state must be fully reported for tax and then the credit must be taken in the amount of such fuel which is taken back out of this state. This is to be done on the same periodic excise tax return so that the net effect is that the tax is actually paid only upon the portion of fuel consumed here.]
- (vi) The credit for fuel-in-tanks purchased in this state must be accounted for by using a fuel-in-tanks credit certificate in substantially the following form: [ample form omitted]...

Rule 252 places the responsibility upon the purchaser giving the certificate to assume liability for payment of any hazardous substances taxes remaining on fuel not subject to the fuel-in-tank credit. Rule 252(5)(b)(vi). The purchaser must keep the records necessary to determine the amount of tax for which the purchaser may become liable. Rule 252(5)(b)(viii). In accordance with these provisions, a taxpayer assumes the liability for the HST and PPL that was originally the obligation of the refiners in Washington on fuel not subject to the credit. In addition, an air carrier is liable for the HST and PPL due on fuel purchased outside Washington that it brought into Washington and consumed here. Det. No. 97-17, 16 WTD 211 (1997).

Taxpayer argued it did not owe tax on the fuel it purchased in Washington because the vendor was the first possessor. Taxpayer is correct in that Rule 252 provides that any successive possessions of any previously taxed hazardous substances are exempt from HST and PPT. For tax-exempt treatment a purchaser must provide documentation. Evidence of previously taxed products may be in the form of certificates taken in good faith or other documentation that establishes proof of prior payment:

- (a) Any successive possessions of any previously taxed hazardous substances are tax exempt.
  - (i) Any person who possesses a hazardous substance which has been acquired from any other person who is registered with the department of revenue and doing business in this state may take a written statement certifying that the tax has been previously paid. Such certifications must be taken in good faith and must be in the form provided in the last part of this section. Blanket certifications may be taken, as appropriate, which must be renewed at intervals not to exceed four years. These certifications may be used for any single hazardous substance or any broad classification of hazardous substances, e.g., "all chemicals."
  - (ii) In the absence of taking such certifications, the person who possesses any hazardous substance must retain proofs that it purchased or otherwise acquired the substance from a previous possessor in this state. It is not necessary for subsequent possessors to obtain certificates of previously taxed hazardous substances in order to perfect their tax exemption. Documentation which establishes any evidence of previous tax payment by another person will suffice. This includes invoices or billings from in state suppliers which reflect their payment of the tax or simple bills of lading or delivery documents revealing an in state source of the hazardous substances.

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- (vii) This certificate may be executed and provided to any possessor of fuel in this state, throughout the chain of distribution, with respect to fuel which ultimately will be sold and delivered into any carrier's fuel tanks in this state. Thus, refiners or manufacturers will take such certificates directly from carriers or from their wholesale purchasers who will sell to such carriers. Similarly, fuel dealers and distributors will take such certificates from carriers to whom they sell such fuel. These certificates must be retained as a permanent part of such seller's business records.
  - (viii) Persons who execute and provide these credit certificates to their fuel suppliers must retain suitable purchase and sales records as may be necessary to determine the amount of tax for which such persons may be liable.
  - (ix) Blanket certificates may be used to cover recurrent purchases of fuel by the same purchaser. Such blanket certificates must be renewed every two years.

Rule 252(5)(b).

[Rule 252, Part I, subpart (4)(a); *see also* Rule 252, Part II, subpart (4)(a) (“Any successive possessions of any previously tax petroleum products are exempt in precisely the manner as the same exemption for the hazardous substance tax.”).]

Taxpayer has not provided the required documentation that the vendor paid HST or PPT on the aviation fuel it purchased. Thus, we cannot grant Taxpayer’s petition based on its unsupported claim that the vendor paid HST and PPT.

Here, the Audit Division did not tax all of the fuel that Taxpayer’s aircraft brought into Washington in its fuel tanks and purchased from Washington vendors. As discussed previously, the expectation is that an air carrier will purchase fuel in Washington without payment of tax and then calculate and report HST and PPT on only the fuel burned within Washington. The assessment correctly taxed Taxpayer on the fuel that it burned in Washington.

Here, Taxpayer has not provided any documents, i.e., invoices or fuel contracts showing that either HST or PPT had been previously paid on aviation fuel it consumed in Washington. Rule 252, Part I, subpart (1)(c) provides “that if the tax has not been paid upon any hazardous substance or product the department may collect the tax from any person who has had possession.”<sup>8</sup> Accordingly, we conclude that the Audit Division correctly assessed HST and PPT on the fuel Taxpayer’s aircraft burned in Washington.

#### DECISION AND DISPOSITION:

Taxpayer's petition is denied.

Dated this 30<sup>th</sup> day of July 2014.

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<sup>8</sup> Although the tax applies only once, it may be collected from any person who had possession of the fuel in this state, not just the first possessor. If the first possessor has not paid the tax, the Department may collect the tax from a successive possessor. RCW 82.21.040(1). RCW 82.21.040(1) creates a statutory debt obligation running from the first possessor to any successive possessor who has paid the tax. Thus, the successive possessor may look to the first possessor to recover the taxes collected by the Department.