Cite as Det. No. 99-305, 21 WTD 114 (2002)

BEFORE THE APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition For Correction of Assessment of	)	D E T E R M I N A T I O N
	)	No. 99-305
. . .	)	Registration No. . . .
	)	FY. . . /Audit No. . . .

[1] RULE 252; RCW 82.21.020: HST TAX -- ENACTMENT -- INITIAL CERCLA LISTING -- REVOCATION. Where the EPA had originally listed a product as a hazardous substance on the CERCLA list and it remained on the list at the time RCW 82.21 was enacted, the EPA's subsequent revocation of that listing did not apply retroactively for purposes of RCW 82.21.

[2] RULE 252; RCW 82.21.020: HST TAX -- IMPLEMENTING STATUTE -- LANGUAGE -- STATUTORY INTENT -- CLEAR AND UNAMBIGUOUS. Where a statute defines "hazardous substance" to include all products defined as a hazardous substance under CERCLA as of March 1, 1989 the language of the statute is clear and unambiguous and the Department may not consider legislative intent to rule otherwise.

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:

A chemical manufacturer protests the imposition of the hazardous substance tax on its possession within this state of a product that was subsequently removed from the Environmental Protection Agency's (EPA) hazardous substances list.[1]

[1] Identifying details regarding the taxpayer and the assessment have been redacted pursuant to RCW 82.32.410.

FACTS:

Okimoto, A.L.J. – . . . (Taxpayer) is a distributor/seller of various agricultural chemical products based [outside Washington]. Taxpayer's books and records were examined by the Audit Division (Audit) of the Department of Revenue (Department) for the period January 1, 1994 through September 30, 1997. The audit examination resulted in additional taxes and interest owing of $. . . and Document No. FY. . . was issued in that amount on May 27, 1998. Taxpayer protested the assessment and it remains due.

Schedule 7 -- Tax Due on Unreported Amounts Subject to the Hazardous Substance Tax

In this schedule, Audit assessed hazardous substance tax (HST) on . . . [(product)] because it was listed as a hazardous substance under the federal comprehensive environmental response, compensation, and liability act of 1980, 42 U.S.C. Sec. 9601(14), (CERCLA list) as of March 1, 1989, the effective date of the legislation imposing the tax.

Taxpayer acknowledges that [product] was listed as a hazardous substance on the CERCLA list on March 1, 1989, but states that the listing was in error. At the time, Taxpayer was in the process of having [product] declared a non-hazardous substance by the federal agency charged with maintaining the list, the Environmental Protection Agency (EPA). The EPA subsequently found [product] to be an innocuous substance and revoked its earlier listing and removed the substance from the CERCLA list [in late] 1989.

CONTENTIONS AND ARGUMENTS:

First, Taxpayer argues that the EPA's revocation of [product's] listing on the CERCLA list voids, ab initio, [product's] listing on the CERCLA list. Taxpayer relies on the definition of "revoke" found in the sixth edition of Black's Law Dictionary. Taxpayer states that since the EPA subsequently found product to be innocuous in [late] 1989, that the original listing of [product] as a hazardous substance was in error. By revoking the listing, Taxpayer argues that the EPA corrected the erroneous listing, retroactively. Taxpayer believes this situation is similar to a court determining an act to be unconstitutional. In such cases, Taxpayer states that courts have generally applied the correction retroactively to the inception of the statute.

In support of its position, Taxpayer also states that it received a ruling on a "no-name basis" from the Department's Taxpayer Information and Education Division (TI&E) stating that substances which have been removed from the CERCLA list by the EPA are not subject to HST.

Next, Taxpayer states that it was the intent of Initiative 97 that the HST only apply to substances that were actually hazardous. Taxpayer maintains that the tax was not intended to apply to non-hazardous substances. Taxpayer argues that since the EPA determined that [product] was an innocuous substance and subsequently revoked its listing on the CERCLA list, it is contrary to the purpose of the statute to assess tax. Taxpayer argues that courts must consider legislative intent in interpreting statutes and cites Janovich v. Herron, 91 Wn.2d 767, 592 P. 2d 1096

(1979), International Paper v. Revenue, 92 Wn. 2d 277, 595 P.2d 1310 (1979), and Strenge v. Clarke, 89 Wn.2d 23, 569 P.2d 60 (1977) in support of this statement.

ISSUES:

1) Where the EPA had originally listed a product as a hazardous substance on the CERCLA list and it remained on the list at the time the RCW 82.21 was enacted, did the EPA's subsequent revocation of that listing apply retroactively for purposes of RCW 82.21?

2) Where a statute defines "hazardous substance" to include all products defined as a hazardous substance under CERCLA as of March 1, 1989, may the Department consider legislative intent to determine whether the HST applies to a product whose CERCLA listing has been revoked?

DISCUSSION:

RCW 82.21.030 imposes a pollution tax on "the privilege of possession of hazardous substances in this state." RCW 82.21.020(1)(a) defines "Hazardous substance" to mean:

> Any substance that, on March 1, 1989, is a hazardous substance under section 101(14) of the federal comprehensive environmental response, compensation, and liability act of 1980, 42 U.S.C. Sec. 9601(14), as amended by Public Law 99-499;

Taxpayer acknowledges that [product] was listed as a hazardous substance under CERCLA on March 1, 1989. Taxpayer contends that the EPA's revocation of that listing [in late] 1989 made [product's] designation as a hazardous substance on the CERCLA list on March 1, 1989 to be null and void, retroactively to that date. . . . We find this argument unpersuasive for two reasons.

First, the term "revoke" is not defined in the Revenue Act Absent a contrary definition in a statute, words are given their ordinary and common meaning, which can be found in dictionaries. John H. Sellen Constr. v. Department of Rev., 87 Wn.2d 878, 558 P.2d 1342 (1976). Black's Law Dictionary defines the term "revoke" as:

> Revoke: To annul or make void by recalling or taking back. To cancel, rescind, repeal, or reverse, as to revoke a license or will. See also Revocation. Black's Law Dictionary, at 1188 (5th ed. 1979).

"Revocation" is further defined as:

> The recall of some power, authority, or thing granted, or a destroying or making void of some deed that had existence until the act of revocation made it void. It may be either general, of all acts and things done before; or special, revoking a particular thing. Black's Law Dictionary, at 1187.

Although the first definition of "revoke" could be interpreted as Taxpayer suggests, the subsequent definition of "revocation" clearly states that the power or authority being revoked has existence or validity prior to being revoked. As a general rule, courts presume that statutes operate prospectively unless there is some contrary legislative indication. Agency Budget Corp. v. Washington Ins. Guar. Ass'n, 93 Wn. 2d 416, 610 P.2d 361 (1980). Therefore, we find that the EPA's "hazardous substance designation" for [product] was valid on March 1, 1989 and remained valid until it was later revoked.

Second, RCW 82.21. was enacted by an initiative of the people in 1989. At that time, the make-up of the CERCLA list was undergoing changes.[2] Where an identification process of a tax base is changing, it is desirable for the identity of the substances being taxed to have some certainty in order to gain voter approval and to provide adequate notice to taxpayers. Initiative 97 resolved this uncertainty by incorporating by reference, as of a date certain (March 1, 1989) all products that were considered a hazardous substance under:

> …section 101(14) of the federal comprehensive environmental response, compensation, and liability act of 1980, 42 U.S.C. Sec. 9601(14), as amended by Public Law 99-499;

The EPA applied the standards of the above act to arrive at what is commonly referred to as the "CERCLA list" of hazardous substances. Taxpayer concedes that [product] was on the CERCLA list as of March 1, 1989, the effective date of the initiative. The issue then becomes whether the EPA's subsequent de-listing of product from the CERCLA list in [late] 1989, also de-lists product from RCW 82.21.020.

We believe it does not. There is a specific rule of statutory construction that is applicable here. It states:

> A statute of specific reference incorporates the provisions referred to from the statute as of the time of adoption without subsequent amendments, unless the legislature has expressly or by strong implication shown its intention to incorporate subsequent amendments with the statute. In the absence of such intention subsequent amendments of the referred statute will have no effect on the reference statute. 2B J. Singer, Sutherland Stat. Const. Section 51.08 at 192 (5th ed. 1992), Rosell v. Department of Social & Health Services, 33 Wash. App. 153, 652 P.2d 1360 (1982).

In Taxpayer's case, the referred statute is CERCLA, and the reference statute is RCW 82.21. The above rule of statutory construction dictates that the subsequent amendment or de-listing of a product to the CERCLA list has no effect on RCW 82.21.

We further note that it is an unconstitutional delegation of legislative power for a statute to adopt future federal rules, regulations, or statutes. State ex rel. Kirschner v. Urquhart, 50 Wn. 2d 131,

[2] In fact, Taxpayer's own petition to de-list [product] from the CERCLA list was pending before the EPA on March 1, 1989.

310 P.2d 261 (1957), State v. Crawford, 104 Kan. 141, 177 Pac. 360 (1919). Accordingly, we find that the EPA's de-listing of [product] from the CERCLA list had no effect on [product's] status as a hazardous substance under RCW 82.21.

Nor can we grant relief based on Taxpayer's assertion that it was not the intent of the statute to subject non-hazardous substances to HST. Although it may not have been the intent of the statute to tax non-hazardous substances, the statute does clearly impose the tax on: "Any substance that, on March 1, 1989, is a hazardous substance under section 101(14) of the federal comprehensive environmental response, compensation, and liability act of 1980, 42 U.S.C. Sec. 9601(14), as amended by Public Law 99-499." This language is clear and unambiguous. It adopts by reference, all substances that were listed as hazardous substances on the CERCLA list as of March 1, 1989 and expresses no intent to adopt future amendments. It is also clear that product was on that list on March 1, 1989. If a statute is clear and unambiguous, courts do not look beyond the language of the statute State v. Enstone, 137 Wn. 2d 675, 974 P.2d 828, (1999). Therefore, we find that [product] is a hazardous substance within the meaning of RCW 82.21.020. Taxpayer's petition is denied.

DECISION AND DISPOSITION:

Taxpayer's petition is denied.

Dated this 22nd day of November 1999.