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. 97-017
. . .	)	Registration No. . . .
	)	FY. . ./Audit No. . . .

RULE 252; RCW 82.21.050, RCW 82.23A.040: HAZARDOUS SUBSTANCE TAX -- PETROLEUM PRODUCTS TAX -- JET FUEL -- FUEL IN TANKS -- INCOMING FLIGHTS. Jet fuel consumed on incoming flights is subject to hazardous substance tax and petroleum products tax.

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:

An airline appeals the assessment of hazardous substance tax and petroleum products tax on fuel consumed on flights coming into Washington.[1]

FACTS:

Pree, A.L.J. -- The taxpayer carries passengers for hire on interstate flights in and out of Washington. The Department of Revenue's Audit Division (Audit Division) reviewed the taxpayer's books and records for the period January, 1991 to June, 1993. As a result of this review, the Audit Division issued a tax assessment. The assessment included use tax,

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

petroleum products tax, hazardous substance tax, and interest.

The Audit Division issued a post-assessment adjustment (PAA). The taxpayer appealed the assessment.

The taxpayer protested the assessment of hazardous substance tax and petroleum products tax on fuel consumed on flights coming into Washington. The taxpayer contends that imposing those taxes on consumption of such fuel violates the Commerce Clause of the U. S. Constitution. According to the taxpayer first possession of the fuel-in-tank of an aircraft occurs only when the aircraft ends its interstate movement in Washington by landing at an airport here.

The taxpayer also argues that the fuel consumed on incoming flights was purchased and loaded in another state. The taxpayer asserts that it paid similar taxes, and imposing tax on such fuel is a case of double taxation, and unconstitutional.

ISSUES:

Can the Department assess hazardous substance tax or petroleum products tax on fuel consumed while in Washington on flights coming into Washington?

DISCUSSION:

Hazardous substance tax is imposed upon the privilege of possessing hazardous substances in Washington. RCW 82.21.030. Similarly, petroleum products tax is imposed upon the privilege of possessing petroleum products in Washington. RCW 82.23A.020. Aviation fuel is a petroleum product. RCW 82.23A and RCW 81.21.020(2). Petroleum products are hazardous substances. RCW 82.21.020(1)(b). Therefore, unless otherwise exempt, the taxpayer's possession of aviation fuel in Washington is subject to those taxes.

The Department's administrative rule, WAC 458-20-252(4)(e) (Rule 252), provides in part:

> Persons or activities which the state is prohibited from taxing under the United States Constitution are tax exempt.

. . .

> (ii) The tax will not apply with respect to any possession of any hazardous substance purchased, extracted, produced or manufactured outside this state which is shipped or delivered into this state until the interstate transportation of such substance has finally ended in this state. Thus, out of state sellers or producers need not pay the tax on substances shipped directly to customers in this state. The customers must pay the tax upon their first possession unless otherwise expressly exempt.
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> (iv) However, the tax will not apply with respect to possessions of substances which are only temporarily stored or possessed in this state in connection with through, interstate movement of the substances from points of origin to points of destination both of which are outside of this state.

(Emphasis supplied.)

The taxpayer contends that transportation had not finally ended until its planes landed, and therefore, the Department could not tax the fuel consumed prior to landing.

The analysis begins with the proposition that the rules of statutory construction apply to the interpretation of administrative rules. Multicare Medical Center v. DSHS, 114 Wn.2d 572, 591, 790 P.2d 124 (1990) citing State v. Burke, 92 Wn.2d 474, 478, 598 P.2d 395 (1979). Applying the rules of statutory construction to an administrative setting, the following general rules apply. In construing an administrative rule, our primary duty is to ascertain the intent of the Department, which intent must be determined primarily from the language of the rule itself. Service Employees Int'l Union, Local 6 v. Superintendent of Public Instruction, 104 Wn.2d 344, 705 P.2d 776 (1985). The Department's intent, ascertained from the rule's text as a whole, is interpreted in terms of the general object and purposes of the rule. Strege v. Clarke, 89 Wn.2d 23, 569 P.2d 60 (1977). The construction of an administrative rule by the agency, which promulgated it is entitled to great weight. Wash. St. Liquor Control Bd. v. Wash. St. Personnel Bd., 88 Wn.2d 368, 561 P.2d 195 (1977).

The intent of Rule 252 regarding the taxability of fuel on tanks is stated in the Rule itself. It provides in subsection (5)(b) a credit on the value of fuel, which is

carried from this state in the fuel tank of an airplane. That subsection states:

> (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.
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> (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.
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> (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.

(Emphasis supplied.)

The sole issue in this case is whether the Audit Division has correctly interpreted the language of this administrative rule. As an administrative agency, we may not and will not address the constitutionality of the Rule. See, Bare v. Gorton, 84 Wn.2d 380, 383, 576 P.2d 379 (1974). Rule 252 has the force and effect of law unless declared invalid by a court of competent jurisdiction and not appealed from. RCW 82.32.300.

From the credit language quoted above, it is clear that the Department intended to apply the hazardous substance tax and the petroleum products tax once upon fuel from tanks consumed in Washington, whether the fuel was transported in from other states or purchased in Washington. The taxes are imposed upon those possessing jet fuel in Washington in order to pay for the cleanup from fuel spilled in Washington. The risk of spills exists whether the fuel is purchased here for departing flights or brought in from

other states.[2] The Audit Division properly measured the tax by the fuel consumed in Washington.

DECISION AND DISPOSITION:

Taxpayer's petition is denied.

DATED this 31st day of January, 1997.

[2]A credit is also allowed for hazardous substance taxes paid to other states for the same substance. RCW 82.21.050(2).