Cite as Det. No. 99-215, 19 WTD 817 (2000)

BEFORE THE APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition For Correction of Assessment and Refund of	)	D E T E R M I N A T I O N
	)	No. 99-215[1]
. . .	)	Registration No. . . .
	)	FY. . ./Audit No. . . .
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[1] RULE 195; RCW 82.04.250; RCW 82.04.070: RETAILING B&O TAX – GROSS PROCEEDS OF SALES -- DEDUCTION -- FEDERAL AVIATION FUEL AND LEAKING UNDERGROUND STORAGE TANK ("LUST") TAXES. Taxes received by a taxpayer as collecting agent and paid directly to the federal government are deductible under Rule 195. On the other hand, where the taxes are primarily imposed upon the taxpayer, the taxpayer will not be entitled to deduct the taxes because in such case the taxes are simply a cost of doing business. Federal aviation fuel and LUST taxes are imposed on the taxpayer and, as such, are not deductible for B&O tax purposes.

[2] RULE 252; RCW 82.21.030; RCW 82.23A.020; RCW 82.21.040; RCW 82.23A.030(3): HAZARDOUS SUBSTANCE TAX – EXEMPTION -- PETROLEUM PRODUCTS TAX – FUEL CONSUMED IN AIRCRAFT ARRIVING IN WASHINGTON. The hazardous substance and petroleum products taxes apply 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.

[1] The reconsideration determination, Det. No. 99-215R, is published at 19 WTD 834 (2000).

[3] RULE 193D; RCW 82.16.020; RCW 82.16.050: PUBLIC UTILITY TAX. The public utility tax applies to receipts from shipping packages from one Washington city to another, even where the aircraft carrying the packages is on a route that either originates or terminates outside Washington.

NATURE OF ACTION:

The first taxpayer provides nationwide and worldwide expedited air transportation services for small packages. It protests the assessment of hazardous substance and petroleum products taxes with respect 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. The taxpayer also protests the assessment of public utility tax with respect to its receipts from shipping packages from one Washington city to another, where the aircraft is on a route that either originates or terminates outside Washington. The second taxpayer purchases and distributes jet fuel for resale to the first taxpayer for its use in operations. It protests the inclusion of the federal aviation fuel and leaking underground storage tank taxes in the retailing B&O tax base.[2]

FACTS:

C. Pree, A.L.J. (successor to Rene, A.L.J.) – . . . (hereafter "[Fuel Co.]") is a wholly owned subsidiary of . . . . (Hereafter "Parent"). . . . (hereafter "[Transport Co.]") is another subsidiary of Parent. Through its subsidiaries, Parent provides specialized nationwide and worldwide transportation services for small packages.

[Transport Co.] provides nationwide and worldwide expedited air transportation services for small packages. [Transport Co.] is authorized by the United States Department of Transportation to provide air transportation in accordance with the Federal Aviation Act of 1958, as amended. [Transport Co.] operates a fleet of owned and leased aircraft and is one of the largest air carriers in the United States.

[Fuel Co.]'s primary activity is to purchase and distribute jet fuel for resale to [Transport Co.] for its use in operations. In addition, [Fuel Co.] sells jet fuel to unrelated air carriers.

[Fuel Co.]'s assessment. [Fuel Co.] was audited for the period of February 1, 1992, through September 30, 1994. A post assessment adjustment resulted in the assessment of retail sales tax of $. . ., retailing B&O tax of $. . ., hazardous substance tax of $. . ., and interest of $. . . . The assessment totaled $. . . . [Fuel Co.] protests amounts assessed in Schedule 4 of the audit, "Retail Activity Reconciliation." Specifically, [Fuel Co.] protests the inclusion of federal excise taxes in the measure of the retailing business and occupation ("B&O") tax. The federal excise taxes at issue are the federal aviation fuel tax ("aviation fuel tax") and the leaking underground

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

storage tank tax ("LUST tax"), both of which are imposed by 26 U.S.C. 4091. [Fuel Co.] argues that these taxes are excluded from the tax base pursuant to WAC 458-20-195 (Rule 195).

[Transport Co.]'s assessment. [Transport Co.] was audited for the period of January 1, 1990, through March 31, 1994. That audit resulted in the assessment of use tax of $. . ., public utility tax of $. . ., petroleum products tax of $. . ., hazardous substance tax of $. . ., and interest of $. . . . The assessment totaled $. . . . [Transport Co.] protests the assessments set forth in Schedule 7, "Hazardous Substance Tax Reconciliation – Inbound Flights"; Schedule 9, "Petroleum Products Tax Reconciliation – Inbound Flights"; and Schedule 10, "Intrastate Hauling Reconciliation."

The facts regarding [Transport Co.]'s "intrastate hauling" that resulted in the assessment set forth in Schedule 10 are as follows. Another subsidiary of Parent, . . . (hereafter "[Carrier]") is an "indirect air carrier." The taxpayer explains [Carrier]'s role as "the entrepreneur which offers [Transport Co.]'s expedited air service to the general public." The taxpayer explains that under the Federal Aviation Act, an indirect air carrier "is a carrier that offers air transportation to shippers but that does not itself operate aircraft or other transportation equipment." Instead, the taxpayer explains, as an indirect air carrier, [Carrier] contracts primarily with [Transport Co.] (but also with unrelated direct air carriers) for flight services. Shippers pay [Carrier] for shipping their packages. [Carrier], in turn, pays [Transport Co.] for the services it provides. The taxpayer explains that all intercompany pricing for these services is on an arm's length basis. [Carrier] pays [Transport Co.] on a "block hour charge," which is an hourly charge that varies for each type of aircraft [Transport Co.] operates, for each hour that [Transport Co.] flies on [Carrier]'s behalf. The hourly charge is based on the costs of operating the aircraft, plus profit.

[Transport Co.] generally flies its packages to one of several sorting centers, called hubs. Its primary hub is [outside Washington]. Subsidiary hubs are located in cities outside of Washington. At the hubs, the packages are sorted and placed on flights bound for airports near their destinations. At the airports, they are placed on trucks and delivered. The use of hubs allows every point in the service area to be served within the time allowed by the Parent's service guarantees.

Although use of the hubs is the usual method, sometimes packages can reach their destinations within the time allowed without passing through a hub. For example, a package to be shipped from Seattle to Spokane may go directly between these two cities, rather than through a hub. Specifically, during the audit period, [Transport Co.]'s Washington flight operations consisted of approximately . . . flight legs per month into and out of various Washington airports. The majority of these flight legs had either an origin or a destination outside Washington. In addition, [Transport Co.] operated a single flight . . . days each week which originated in Seattle, stopped in Spokane, then in Oregon, and finally in California. The flight then returned to Washington, making the same stops. Thus of the approximately . . . monthly flight legs with an origin or destination in Washington, approximately . . . were between Washington cities.

Over 95% of the air packages carried by [Transport Co.] in Washington had a shipper located in one state or country and a consignee located in another state or country. A small number of air packages had both a shipper and consignee located in Washington. Some of these packages are flown only on the above-referenced flight legs between Washington cities and are not carried outside the state by [Transport Co.]. During the audit period, the taxpayer notes that there were approximately . . . of such packages per day in Washington. In Schedule 10, the Audit Division assessed public utility tax on income from packages that were flown on flights between Washington cities.

[Transport Co.] argues that all of its flights in Washington constitute interstate commerce because (1) the flights are between a point in Washington and a point in another state or (2) in the case of its flights between Washington cities, although the flight segment itself is between Washington points, the flight is a continuation of a flight from California and the freight being carried is overwhelmingly being carried in interstate commerce.

In Schedule 7, the Audit Division assessed the hazardous substance tax upon the wholesale value of jet fuel consumed by [Transport Co.] in inbound flights from the point at which the aircraft crossed the Washington border to landing at Washington airports. In Schedule 9, the Audit Division assessed the petroleum products tax upon the wholesale value of jet fuel consumed by [Transport Co.] in the same manner.

[Transport Co.] argues that the fuel carried in the tanks of its aircraft entering Washington was purchased outside Washington and was being shipped in interstate commerce until such time as the aircraft came to rest in the state.

ISSUES:

1. Whether the aviation fuel and LUST taxes were properly included in the retailing B&O tax measure.
2. Whether the hazardous substance and petroleum products taxes apply 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.
3. Whether the public utility tax applies to receipts from shipping packages from one Washington city to another, where the aircraft is on a route that either originates or terminates outside Washington.

DISCUSSION:

1. Whether the aviation fuel and LUST taxes were properly included in the retailing B&O tax measure. I.R.C. section 4091 imposes the aviation fuel and LUST taxes. [Fuel Co.] argues that it collects these taxes from its customers and pays them over to the Internal Revenue Service ("IRS"). In reporting its gross receipts for B&O tax purposes, [Fuel Co.] did not include these taxes in the measure. The Audit Division determined that these taxes should have been included in the measure and issued the assessment accordingly.

RCW 82.04.250 imposes the retailing B&O tax with respect to retail sales. The measure of the tax is "gross proceeds of sales." RCW 82.04.250. "Gross proceeds of sales" is defined in RCW 82.04.070 as follows:

> "Gross proceeds of sales" means the value proceeding or accruing from the sale of tangible personal property and/or for services rendered, **without any deduction on account of** the cost of property sold, the cost of materials used, labor costs, interest, discount paid, delivery costs**, taxes, or any other expense whatsoever paid** or accrued and without any deduction on account of losses.

(Emphasis added.) RCW 82.04.090 defines "value proceeding or accruing" in pertinent part as follows:

> "Value proceeding or accruing" means the consideration, whether money, credits, rights, or other property expressed in terms of money, actually received or accrued.

Thus, if a taxpayer "actually" receives or accrues value from a retail sale, the amount is subject to retailing B&O tax, unless a credit, deduction or exemption is available.

The only potentially applicable statute is RCW 82.04.4285, which provides a deduction for certain taxes. During the period at issue, it provided:

> In computing tax there may be deducted from the measure of tax so much of the sale price of motor vehicle fuel as constitutes the amount of tax imposed by the state or the United States government upon the sale thereof.

However, for purposes of this statute, "motor vehicles" are limited to those that operate on the land. See RCW 82.36.010(19). As such, this statutory deduction does not apply.

Instead, the taxpayer relies on WAC 458-20-195(Rule 195)[3] for the claimed deduction. Rule 195 provides in pertinent part, as follows:

> (A) DEDUCTIBILITY, GENERALLY. In computing tax liability, the amount of certain taxes may be excluded or deducted from the gross amount reported as the measure of tax under the business and occupation tax . . .
>
> (C) OTHER TAXES. The amount of taxes collected by a taxpayer, as agent for the . . . federal government, may be deducted from the gross amount reported. . . .

[3] Rule 195 has been amended, with an effective date of July10, 1999. The amendments do not affect the analysis in this case.

> This deduction applies only where the amount of such taxes is received by the taxpayer as collecting agent and is paid by the agent directly to the . . . federal government. When the taxpayer is the person upon whom a tax is primarily imposed, no deduction or exclusion is allowed, since in such case the tax is a part of the cost of doing business. The mere fact that the amount of tax is added by the taxpayer as a separate item to the price of goods he sells, or to the charge for services he renders, does not in itself, make such taxpayer a collecting agent for the purpose of this deduction.
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> SPECIFIC TAXES, DEDUCTIBLE. The deductions under paragraphs B and C above apply to the following excise taxes among others:
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> Federal--
> Tax on gasoline. 26 U.S.C.A. Sec. 4081;
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> . . .

Thus, if the taxpayer receives the taxes "as collecting agent" and pays the taxes directly to the federal government, the taxes will be deductible under Rule 195. On the other hand, if the taxpayer is the person upon whom the taxes are primarily imposed the taxpayer will not be entitled to deduct the taxes because in such case the taxes are simply a cost of doing business.

I.R.C. section 4091, which imposes the aviation fuel and LUST taxes, provides in pertinent part as follows:

> There is hereby imposed a tax on the sale of aviation fuel by the producer or the importer thereof or by a producer of aviation fuel.

In section 4091, the LUST tax is simply referenced as an increase in the rate at which the aviation fuel tax is imposed. As such, the issue of whether the aviation fuel tax and the LUST tax are deductible is governed by the same analysis.

The taxpayer argues that these taxes are "in substance" imposed on the buyers/users of jet fuel, rather than the sellers of the fuel. As such, the taxpayer argues, Rule 195 authorizes the exclusion of these taxes. Further, the taxpayer argues, the taxes at issue are similar to those imposed under section 4081, which are specifically referenced as deductible in the rule. We will address the taxpayer's section 4081 argument first. However, we first note that, as a general principle, tax statutes conferring credits, refunds or deductions must be construed narrowly, and any ambiguity must be resolved in favor of taxation. See, In re All-State Constr. Co., 70 Wn.2d 657, 665, 425 P.2d 16 (1967); Corporation of Catholic Archbishop v. Johnston, 89 Wn.2d 505, 507, 573 P.2d 793 (1978); see e.g., Det. No. 98-059, 17 WTD 194 (1998).

I.R.C. section 4081, which imposes the tax on motor vehicle fuel, provides in pertinent part as follows:

> There is hereby imposed a tax . . . on . . . the sale of taxable fuel to any person who is not registered.

The taxpayer explains that I.R.C. sec. 4081 imposes two taxes on the sale of gasoline and diesel fuel if the purchaser is not properly registered to purchase the fuel free of tax. The first tax is an excise tax on each gallon of gasoline or diesel fuel. The second tax is the LUST tax on the same sales of gasoline. Section 4081 imposes tax on gasoline and diesel fuel that is used in highway vehicles, trains and boats. Fuel used in aircraft is not subject to tax under this section of the I.R.C.

The taxpayer further explains that section 4091 imposes two taxes on the sale of aviation fuel if the purchaser is not properly registered to purchase fuel free of tax. The first tax imposed under section 4091 is an excise tax on each gallon for fuel used in "non-commercial" aviation. The second tax is a LUST tax as is imposed in section 4081 on sales of gasoline and diesel fuel not used in aircraft.

Most major air carriers are entitled to purchase aviation fuel free of the aviation fuel tax imposed under section 4091. However, some of the taxpayer's customers, typically smaller air carriers, do not have the same right to purchase fuel free of this tax. In making sales to these customers, the taxpayer collects the tax and remits it to the IRS.

The taxpayer argues that Rule 195 lists certain taxes as specifically excludable from the tax base and certain taxes as specifically includable in the tax base. The taxes imposed under section 4081 are listed as specifically excludable. The taxes imposed under section 4091 are not mentioned. The taxpayer argues that the taxes imposed by section 4091 are identical to those imposed in 4081 in "structure and legal effect."

We agree that the language imposing the taxes in section 4081 and 4091 is similar. However, the basis for the reference to section 4081 in Rule 195 as a deductible tax is the specific statutory deduction set forth in RCW 82.04.4285. As discussed above, this deduction does not apply to aircraft fuel. Absent this specific statutory deduction, the section 4081 taxes would not qualify for deduction as a tax imposed on the buyer. See Gurley v. Rhoden, 421 U.S. 200 (1975)(the section 4081 tax is a tax on the seller, not the consumer). Thus, the taxpayer's argument that the section 4091 taxes are deductible because they are similar to the section 4081 taxes must fail.

The taxpayer next argues that the section 4091 taxes are deductible because they are imposed on the buyers. The taxpayer explains:

> The taxing regime imposed on users of air transportation by the Federal government relies primarily on the excise tax on air transportation that is imposed by Section 4261 of the IRC. This tax applies to commercial carriers *i.e.,* carriers that sell transportation services to others. Such commercial carriers do not pay the Section 4091 tax.

> By contrast, operators of aircraft that are not commercial carriers, *i.e.*, that do not sell air transportation services to others, do not pay the Section 4261 tax. These operators are subject instead to the Section 4091 tax. It is clear, therefore, that the Section 4091 tax is, in substance, imposed on purchasers and not on sellers of jet fuel.
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> The statutory mechanism by which the above taxing regime is established is as follows. IRC Section 4092 exempts from the Section 4091 tax fuel that is "sold for nontaxable uses as defined by Section 6427(l)(1)(B)." Section 6427(l)(1)(B), in turn, defines a "nontaxable use" as a use that is exempt from the tax imposed by Section 4041(c)(1). Finally, Section 4041(c)(1) imposes a tax on fuel used in noncommercial aviation.
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> Accordingly, fuel used in commercial aviation is exempt from the tax imposed by Section 4041(c)(1). Therefore the use of such fuel is a "nontaxable use" within the meaning of Section 6427(l)(1)(B) and is exempted from the Section 4091 tax by Section 4092.
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> Thus, the Section 4091 tax is imposed or not imposed on a sale of fuel depending on the status of the **buyer** as a commercial or noncommercial operator. This demonstrates that, in substance, the tax is imposed on certain **buyers** of aviation fuel and not on sellers of such fuel.

(Emphasis the taxpayer's.) The taxpayer notes that its analysis is supported by its own dealings regarding section 4091. Specifically, the taxpayer notes that all of its customers during the audit period were commercial carriers. As such, none of its customers was subject to the section 4091 tax. However, while all commercial users of aviation fuel are exempt from the section 4091 tax, only a certain class of users is entitled to purchase fuel free of the tax by supplying their sellers with exemption certificates. Other commercial users must pay the tax to their suppliers and then request a refund from the IRS. The taxpayer notes that a few of its customers were required to pay the tax to it, then seek a refund; these are the taxes at issue here. The taxpayer concludes:

> It is these monies – monies paid by certain customers to [Fuel Co.], by [Fuel Co.] to the IRS, **and then refunded by the IRS to the customers** – that the auditor seeks to include in [Fuel Co.]'s Washington tax base. Since the IRS refunded these monies **to the customers** and not to [Fuel Co.], the conclusion is inescapable that [Fuel Co.] collected them and paid them to the IRS as agent for the IRS and did not pay them on its own behalf. Accordingly, these funds are deductible in accordance with the terms of WAC 458-20-195.

(Emphasis the taxpayer's.) The mere fact that the amount of tax is added by the taxpayer as a separate item on its invoices to the price of goods he sells, or to the charge for services he renders, does not in itself, make such taxpayer a collecting agent for the purpose of this deduction. Rule 195. In Det. No. 94-116, 15 WTD 26 (1995), we reasoned:

> While the taxpayers may label the charges on their invoices as taxes imposed on their customers, clearly the municipal taxes included in the assessments were imposed upon the taxpayers for providing the cellular service to their customers, a retail sale. The customers purchased the cellular service only. The municipal taxes separately stated on the invoices were not imposed on the customers. The taxpayers only passed these costs on to their customers in their invoices. Any business may itemize its expenses and pass them on to customers through increased charges attributable to those expenses. The retail receipts of the business, however, are still measured under RCW 82.04.070

The same analysis is applicable here. The fact that the IRS may have refunded the taxes that the taxpayer passed on to its customers is not dispositive. We do not know the circumstances of the refunds, but the taxes may have been refunded directly to the customers as a matter of administrative convenience.

The taxpayer next argues that because liability for the taxes depends on the status of the buyer, the taxes are imposed on the buyer. However, we note that the fact the liability for the tax hinges on the status of the taxpayer's buyers does not mean that the buyers, rather than the taxpayer, are liable for the taxes. For example, a taxpayer's liability for the wholesaling B&O tax depends on whether the buyer is a "consumer" or a person who is purchasing the items for resale. See RCW 82.04.050; 82.04.190; 82.04.270. However, B&O taxes are not deductible under Rule 195 because these taxes are imposed on the seller. Rule 195; see Det. No. 96-147, 16 WTD 117 (1996)(Certain taxes are excluded from the measure of the tax because they are imposed on the taxpayer's customer. For example, retail sales tax collected from a customer is excluded from the measure of tax because the tax is imposed on the buyer and the seller receives the tax in trust. However, the B&O tax is never excluded from the measure of state taxes.)

In short, we find no basis for concluding that the taxpayer merely receives the taxes imposed under section 4091 "as collecting agent" and that it pays the taxes directly to the federal government. As such, [Fuel Co.]'s petition is denied with respect to this issue.

2. Whether the hazardous substance and petroleum products taxes apply 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.

The hazardous substance tax is imposed upon the privilege of possessing hazardous substances in Washington. RCW 82.21.030. Similarly, the petroleum products tax is imposed upon the privilege of possessing petroleum products in Washington. RCW 82.23A.020. It is the intent of these two taxes to "impose a tax only once" for each hazardous substance or petroleum product "possessed in this state and to tax the first possession" of those substances or products. RCW 82.21.010; RCW 82.23A.005. Aviation fuel is a petroleum product. RCW 81.21.020(2); RCW 82.23A.010(1). Petroleum products are hazardous substances. RCW 82.21.020(1)(b). Therefore, unless otherwise exempt, [Transport Co.]'s possession of aviation fuel in Washington is subject to these two taxes.

RCW 82.21.040(5) and RCW 82.23A.030(3) each provide an exemption for "Persons or activities which the state is prohibited from taxing under the United States Constitution." The Department's administrative rule, WAC 458-20-252(4)(e) (Rule 252), explains in part:

> (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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> . . .
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> (iv) . . . [T]he 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 added.) The taxpayer argues, based on Rule 252, that the fuel carried in the tanks of its aircraft entering Washington was purchased outside Washington and was being shipped in interstate commerce until such time as the aircraft came to rest in the state. The taxpayer reported and paid tax on the fuel remaining in the tank after the aircraft landed, to the extent the fuel was ultimately consumed over Washington upon departure of the aircraft. Thus, the taxpayer argues, the Audit Division incorrectly assessed tax on fuel consumed in inbound flights before the interstate shipment of such fuel had finally ended in Washington. Specifically, the taxpayer relies on RCW 82.21.040(5) and RCW 82.23A.030(3), quoted above, which exempt from tax any persons or activities that "the state is prohibited from taxing under the United States Constitution."

We have recently addressed this issue in a published determination, which we find dispositive of the issue. In Det. No. 97-17, 16 WTD 211 (1997), the taxpayer protested the assessment of hazardous substance and petroleum products taxes on fuel consumed on flights arriving in Washington. The taxpayer contended that imposition of such taxes violated the Commerce Clause of the U. S. Constitution. As here, the taxpayer argued that the first possession of the fuel in the tanks of aircraft occurs only when the aircraft ends its interstate movement in Washington by landing at an airport here.

Because we find the analysis in this determination dispositive, we quote the determination's reasoning at length:

> 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 [sic] tanks is stated in the Rule itself. It provides in subsection (5)(b) a credit [against the hazardous substance tax] on the value of fuel, which is carried from this state in the fuel tank of an airplane. [Section (5)(a) of Section II of Rule 252 provides: "The credit [for the petroleum products tax] is applied in precisely the same manner as the hazardous substance tax in part 1, subsection (5)(b)." See also RCW 82.21.050(1); RCW 82.23A.010(1).] 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 that 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 [only] 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. The Audit Division properly measured the tax by the fuel consumed in Washington.

(Footnote omitted; emphasis original; bracketed information added.) Similarly, in this case, we find that the Audit Division properly assessed the taxes. The taxpayer possessed and consumed the fuel in Washington. As such, the taxpayer's petition is denied with respect to this issue.

3. Whether the public utility tax applies to receipts from shipping packages from one Washington city to another, where the aircraft is on a route that either originates or terminates outside Washington.

RCW 82.16.020 imposes a tax on the gross receipts of certain public service businesses, including transportation providers. RCW 82.16.050(8) provides that gross receipts from the transportation of commodities from points of origin in Washington to final destinations outside Washington, or vice versa, are exempt from tax.

WAC 458-20-193D (Rule 193 D) addresses transportation services in interstate commerce. It provides in pertinent part as follows:

> In computing [the public utility] tax there may be deducted from gross income the amount thereof derived as compensation for performance of services which in themselves constitute interstate or foreign commerce to the extent that a tax measured thereby constitutes an impermissible burden upon such commerce. A tax does not constitute an impermissible burden upon interstate or foreign commerce unless the tax discriminates against that commerce by placing a burden thereon that is not borne by intrastate commerce, or unless the tax subjects the activity to the risk of repeated exaction of the same nature from other states. Transporting across the state's boundaries is exempt . . . .
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> EXAMPLES OF EXEMPT INCOME:
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> (1) Income from those activities, which consist of the actual transportation of persons or property across the state's boundaries, is exempt.
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> . . .
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> In computing public utility tax, there may be deducted from gross income so much thereof as is derived from actually transporting persons or property . . . from this state to another state or territory or . . . vice versa.
>
> . . .
>
> Insofar as the transportation of goods is concerned, the interstate movement of cargo or freight ceases when the goods have arrived at the destination to which it was billed

> by the out-of-state shipper, and no deduction is permitted of the gross income derived from transporting the same from such point of destination in this state to another point within this state. Thus, freight is billed from San Francisco, or a foreign point, to Seattle. After arrival in Seattle it is transported to Spokane. No deduction is permitted of the gross income received for the transportation from Seattle to Spokane. . . . The interstate movement of cargo or freight begins when the goods are committed to a carrier for transportation out of the state, which carrier will start the transportation to a point outside the state.

With respect to gross receipts from air packages that had an origin or destination outside Washington, [Transport Co.] notes, the Audit Division correctly conceded that the public utility tax does not apply. However, the Audit Division assessed the public utility tax on gross receipts from air packages having both an origin and a destination in Washington, which were flown on [Transport Co.]'s flights between Washington cities.

The Audit Division assessed the tax against the taxpayer on an amount computed by multiplying the approximately . . . packages per day that never left Washington by an amount equal to average revenue per package. The taxpayer states that it has "no quarrel with the computation, as such." However, the taxpayer explains:

> [Transport Co.]'s revenue consists of the block hour charges paid to it by [Carrier]. All flights operated by [Transport Co.] in Washington constitute interstate commerce because (1) the flights are between a point in Washington and a point in another state or (2) in the case of the Seattle-Spokane segments described, although the flight segment itself is between Washington points, the flight is a continuation of a flight from California and the freight being carried is overwhelmingly being carried in interstate commerce.

The taxpayer then cites numerous cases where states were precluded from assessing sales or use taxes with respect to the vehicles, vessels, package delivery cars, etc. used in interstate commerce. From these cases, the taxpayer concludes:

> There can be no question, therefore, that all of [Transport Co.]'s flights operated in Washington are operated in interstate commerce and no question that all of [Transport Co.]'s block hour revenue from such flights is revenue from interstate commerce. Accordingly, none of such revenue is taxable under the public utility tax.

We find the taxpayer's argument that Washington law precludes imposition of the public utility tax to be unpersuasive. RCW 82.16.050(8) and Rule 193D preclude imposition of the tax with respect to the transportation of commodities from points of origin in Washington to final destinations outside Washington, or vice versa. As the taxpayer acknowledges, the income at issue here was derived from the transportation of packages between Washington cities. While these flights eventually went outside the state, the portion of income that was taxed was derived from wholly intrastate activities.

Secondly, the taxpayer argues that 49 U.S.C. sections 1513 and 40116 pre-empt state gross receipts taxes on air transportation. Specifically, the taxpayer notes that 49 U.S.C. section 40116 provides that a state may not impose a tax on the sale of air transportation or on the gross receipts from air commerce or air transportation as defined by the Federal Aviation Act. The taxpayer argues:

> Since all of [Transport Co.]'s activities, including the flights between Seattle and Spokane, involve the carriage by aircraft of freight between states, there can be no doubt that all of such activities constitute "air transportation" as so defined. Accordingly, even if Washington statutes sought to impose the public utility tax on any portion of [Transport Co.]'s receipts, such tax would be pre-empted.

We find the analysis in Det. No. 98-92, 17 WTD 388 (1988), persuasive with respect to this issue. In that determination, the taxpayer argued that the state is pre-empted by federal law from taxing its air transportation charges, which the taxpayer earned from transporting patients by air to and from hospitals. The taxpayer cited as authority Section 7(a) of the Airport Development Acceleration Act of 1973, P.L. 93-94, § 7(a), 87 Stat. 90, formerly codified as 49 U.S.C. § 1513(a). Additionally, the taxpayer cited Aloha Airlines, Inc. v. Director of Taxation, 464 U.S. 7 (1983), which held that the referenced law forbids states from imposing a gross receipts tax on air commerce or air transportation. While we agreed that the state was precluded from taxing income with respect to flights that carried patients, we held that the state was not precluded from taxing flights that carried organs, but not patients. We reasoned:

> The Airport Development Acceleration Act has been recodified in substantially similar form from 49 U.S.C. § 1513(a) to 49 U.S. C. § 40116(b) by P.L. 103-305 in 1994. The current statutory language is as follows:
>
> > (b) **Prohibitions.** -- Except as provided in subsection (c) of this section and section 40117 of this title, a State or political subdivision of a State may not levy or collect a tax, fee, head charge, or other charge on --
> >
> > (1) an individual traveling in air commerce;
> > (2) the transportation of an individual traveling in air commerce
> > (3) the sale of air transportation; or
> > (4) the gross receipts from that air commerce or transportation.
>
> 49 U.S. C. §40102(a)(3) defines "air commerce" . . .
>
> > means foreign air commerce, interstate air commerce, the transportation of mail by aircraft, the operation of aircraft within the limits of a Federal airway, or the operation of aircraft that directly affects, or may endanger safety in, foreign or interstate air commerce.
>
> . . .

"Interstate air commerce" means "the transportation of passengers or property by aircraft for compensation, the transportation of mail by aircraft, or the operation of aircraft in furthering a business or vocation" between states, possessions of the U.S., or the District of Columbia. 49 U.S.C. §40102(24).[4]

The U.S. Supreme Court reviewed these statutes, as they were previously codified, in Aloha Airlines, supra. Aloha Airlines is a commercial airline that was carrying passengers, freight, and mail among the islands of Hawaii. According to the Court, Congress intended to stop the proliferation of local taxes burdening interstate air transportation and resulting in double taxation of air travelers. 464 U.S. at 9-10. The Court continued by declaring:

> Section 1513(a) expressly pre-empts gross receipts taxes on the sale of air transportation or the carriage of persons traveling in air commerce, and Haw. Rev. Stat. §239-6 is a state tax on the gross receipts of airlines selling air transportation and carrying persons traveling in air commerce.

Id., 464 U.S. at 11. The Supreme Court next stated:

> First, when a federal statue unambiguously forbids the States to impose a particular kind of tax on an industry affecting interstate commerce, courts need not look beyond the plain language of the federal statute to determine whether a state statute that imposes such a tax is pre-empted. Thus the Hawaii Supreme Court erred in failing to give effect to the plain meaning of § 1513(a).

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[4] [Transport Co.] notes the following definitions, as well:

> 49 U.S.C. sec. 40102(a)(5) defines "air transportation":
>
> > Air transportation means interstate, overseas, or foreign air transportation or the transportation of mail by aircraft.
>
> 49 U.S.C. sec. 40102(a)(25) defines interstate air transportation as:
>
> > the carriage by aircraft of persons or property as a common carrier for compensation or hire or the carriage of mail by aircraft in commerce between . .
> >
> > a place in any State of the United States of the District of Columbia and any place in any other State of the United States or the District of Columbia; or between places in the same State of the United States through the airspace over any place outside thereof . . .
> >
> > whether such commerce moves wholly by aircraft or partly by aircraft and partly by other forms of transportation.

Id., 464 U.S. at 12. Finally, the Court declared at 464 U.S. at 14-15:

> In conclusion, ...§ 1513(a) proscribes the imposition of state and local taxes on gross receipts derived from air transportation or the carriage of persons in air commerce.
>
> . . .

Excise Tax Bulletin 321.16.179.224 (Second Revision, Issued April 1, 1991)[5] purports to incorporate Aloha Airlines, supra, into its discussion of the various tax classifications which apply to gross receipts earned from services performed with the use of aircraft. The ETB states in part:

> In ALOHA AIRLINES the Court concluded that under Section 7(a) of the Airport Development Acceleration Act of 1973 (ADAA) a State cannot impose a gross receipts tax on the activity of hauling persons or U.S. mail for hire within the limits of any Federal airway. This includes flights that begin and end in Washington (intrastate flights) when the operation of the aircraft is within any Federal airway or any operation or navigation of aircraft which directly affects, or which may endanger safety in, interstate, overseas, or foreign air commerce. (See 49 U.S.C. § 1301 and § 1513(a)). There is no prohibition in federal law from taxing the intrastate transportation of freight with the exception of U.S. mail.
>
> . . .[I]ncome from hauling persons or U.S. mail by aircraft from a Washington location to another Washington location is not taxable. This exclusion from tax does not apply to persons hauling freight by aircraft when the flight begins and ends in Washington . . .
>
> The following is a list of activities with the tax classification identified that applies to the activity. This list is intended to be representative of activities performed with aircraft, but should not be considered as all inclusive.
>
> Other Public Service (Public Utility Tax):
>
> 1. Hauling freight by air when the haul begins and ends in Washington. As noted above, hauling passengers or U.S. mail is exempt . . .

(Emphasis ours.) Thus, the ETB acknowledges that the state cannot tax income from transporting persons by charter aircraft or by common carrier aircraft in interstate

[5] Effective July 1, 1998 Excise Tax Advisories (ETA) replaced Excise Tax Bulletins (ETBs). ETA 321 is persuasive only.

> commerce or in a federal airway in Washington, or from one location in Washington to another location in Washington . . .
>
> [T]he taxpayer . . . provided what its records describe as "organ procurement" flights. If these flights did not carry patients or other passengers for hire, but carried only body organs, medical supplies, or medical equipment or other cargo for hire, then such income is subject to the public utility tax when the hauls began and ended in Washington. ETB 321.
>
> . . . [As] the Supreme Court stated in Aloha Airlines 464 U.S. at 15 in footnote 11 . . .
>
> > Arizona Dept. of Revenue v. Cochise Airlines, 128 Ariz. 432, 626 P. 2d 596 (Ariz. Ct. App. 1980) (§ 1513(a) preempts state gross receipts taxes on the carriage of passengers, but not freight, in air commerce):

(Footnotes added.) Based on the above authority, we find the taxpayer's argument that the federal statute pre-empts imposition of the tax to be unpersuasive. We note that the transportation that was taxed in this case was transportation of cargo (not passengers or mail) between Washington cities. As such, it did not meet the definitions of interstate air commerce or air transportation set forth in the federal statutes. Specifically, the travel was not between "a place in any State of the United States of the District of Columbia and any place in any other State of the United States or the District of Columbia; or between places in the same State of the United States through the airspace over any place outside thereof." See 49 U.S.C. section 40102(a)(25). As noted in Aloha Airlines, "There is no prohibition in federal law from taxing the intrastate transportation of freight with the exception of U.S. mail." As such, the taxpayer's petition is denied with respect to this issue.

DECISION AND DISPOSITION:

The taxpayers' petitions are denied.

Dated this 29th day of June 1999.