Cite as Det No. 10-0130, 30 WTD 45 (2011)

BEFORE THE APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition For Correction of Assessment	)	D E T E R M I N A T I O N
	)	No. 10-0130
. . .	)	
	)	Registration No. . . .
	)	Document Nos. . . ./Audit No. . . .
	)	Docket No. . . .

[1] Rule 252; RCW 82.21.020(1): HAZARDOUS SUBSTANCE TAX (HST) – DEFINITION OF HAZARDOUS SUBSTANCE – WASTE OIL. Used lube oil and bunker fuel are "petroleum products" as defined in RCW 82.21.020(2), which fall within the definition of hazardous substance subject to HST.

[2] Rule 252; RCW 82.21.030: HST – FIRST POSSESSION OF A HAZARDOUS SUBSTANCE. A taxpayer that has control of a hazardous substance with the power to sell or use it or to authorize the sale or use by another when it enters the state has "first possession" and is liable for HST.

[3] Rule 17401; RCW 82.12.0254: RETAIL SALES – USE TAX – INTERSTATE FOR HIRE CARRIERS. A taxpayer with an ICC permit is not entitled to a use tax exemption for its vehicles when they are used in substantial part to transport product that it purchased for resale because it is not acting as a "for hire" carrier.

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.

Klohe, A.L.J. – A local company in the business of used oil collection protests an assessment of hazardous substance tax (HST) on its possession of waste oil, arguing that waste oil is not a "hazardous substance" and that it did not have first possession because it was merely a transporter of the waste oil for hire. Taxpayer also protests the assessment of use tax/deferred sales tax on trucks and trailers that it claims to have used for hire in interstate commerce. We deny Taxpayer's petition.[1]

[1] Identifying details regarding the taxpayer and the assessment have been redacted pursuant to RCW 82.32.410. Nonprecedential portions of this determination have been deleted.

ISSUES

1. Is waste oil consisting of used petroleum products (e.g. used lube oil and bunker fuel) a "hazardous substance" as defined in RCW 82.21.020(1) and WAC 458-20-252?

2. If so, did taxpayer have first possession of a hazardous substance in Washington such that it is liable for HST under RCW 82.21.030 and WAC 458-20-252?

3. Does taxpayer qualify for the use tax exemption for motor vehicles and trailers used by a holder of an Interstate Commerce Commission (ICC) permit that uses the vehicles in substantial part in the normal and ordinary course of its business as a for hire motor carrier pursuant to RCW 82.12.0254 and WAC 458-20-17401?

FINDINGS OF FACT

[Taxpayer] is a Washington for-profit corporation that has been registered to do business in Washington since 2003. . . . Taxpayer's business activities in Washington during the relevant period included purchasing and selling used oil and transporting it from the [out-of-country] generators of the waste oil to the processor in [Washington] and then to the end consumer. Taxpayer advertises . . . that it offers used oil collection services and transport services. Taxpayer also picks up and disposes of other wastes.

The Audit Division of the Department of Revenue (Audit Division) conducted a compliance audit of Taxpayer's books and records for the period January 1, 2005, through March 31, 2008. The Audit Division issued two tax assessments on March 25, 2009, bifurcating the contested portion of the audit (Audit #1), which consisted of HST in the amount of $. . ., and use tax and/or deferred sales tax on ICC trucks and trailers in the amount of $. . ., plus interest on the unpaid tax. The total amount owing on contested Audit #1 prior to additional accrued interest was $. . . .

The other portion of the tax assessment that the Audit Division originally classified as "uncontested" (Audit #2), consisted of $. . . in retail sales tax, $. . . in retailing business and occupation (B&O) tax, and use tax and/or deferred sales tax of $. . ., plus interest on the unpaid tax. In its Appeal Petition, Taxpayer protests a portion of the additional use tax and/or deferred sales tax assessed in Audit #2 on asset purchases other than ICC trucks and trailers, including . . . 40 gallon oil tanks and property improvements. The total contested amount owing on Audit #2 prior to additional accrued interest is approximately $. . . .

The Audit Division based the HST assessment, measured by the wholesale sales price, on its conclusion that Taxpayer is the first possessor of the waste oil in Washington. The Audit Division's review of Taxpayer's books and records showed that Taxpayer paid the processor for recycling the oil when it picked up the recycled waste oil for delivery to its customer. Within

thirty (30) days of delivery, the customer paid Taxpayer for the recycled waste oil.[2] From the proceeds of the sale of the recycled oil, Taxpayer paid the various [out-of-country] generators of the waste oil based on the wholesale price prior to recycling . . . . The Audit Division found that no other entity paid the HST. Therefore, it issued an assessment to Taxpayer. Taxpayer appealed.

On appeal, Taxpayer argues that waste oil (typically consisting of used lube oil and bunker fuel) is not regulated as a hazardous substance by the Washington Department of Ecology (Ecology) or the Environmental Protection Agency (EPA), so it should not be subject to HST. Taxpayer further argues that used oil is not a "product" and is therefore not subject to tax because Ecology's administrative rules provide that used oil cannot be sold until it meets the standard for "used oil" in WAC 173-303-515. Taxpayer states that the waste oil has no value until it is received by the processor in [Washington] who recycles the waste oil for use by end consumers. In further support of its argument that waste oil has no value, Taxpayer states that is not insured for loss or theft, only for potential environmental damage from a spill or other accident.

Alternatively, Taxpayer argues that even if waste oil is a hazardous substance, Taxpayer is not the "first possessor." According to Taxpayer, it merely transports the oil from the [out-of-country] generator to the processor in [Washington], and then transports it from the processor to the end consumer. Taxpayer claims that the processer actually has first possession of the oil in Washington because Ecology treats Taxpayer as just the "transporter" of the waste oil for regulatory purposes. Taxpayer claims that the [out-of-country] generator is the owner of the waste oil at the time it is transported from [outside the country] and delivered to the processor and that its customer (the end consumer) is the owner of the waste oil from the time the recycled oil is picked up from the processor in [Washington] and that Taxpayer is just paid to collect the oil.

Taxpayer argues that from an environmental regulatory standpoint, the generator of the waste oil is the owner and has constructive possession of it until Taxpayer delivers it to a certified processing facility for recycling. According to Taxpayer, the processor extracts water from the waste oil and then certifies that the product is ready for use by end consumers. Taxpayer states that it may pay the generator for the waste oil or the generator may the Taxpayer (because without a market for recycled waste oil, generators of the waste must pay to have their waste picked up and properly disposed of), or it may be a wash, depending on the market.

In support of its argument that it is merely transporting the waste oil for hire, Taxpayer provided copies of two sample contracts. The first contract between Taxpayer, the generator of the waste oil, and the processor, which is not dated, lists the Taxpayer as the "Carrier."[3] The only material terms in the portion of the contract provided by Taxpayer state that the parties agreed that the

[2] The price of the recycled waste oil fluctuated . . . . Taxpayer charged and collected retail sales tax on the recycled waste oil from its customer.

[3] Taxpayer provided only page 1 of the contract . . . . The sample contract is not dated, so it is not clear if this is a representative contract from the audit period.

"hazardous recyclable material" to be transported consists of lubricating oil from internal combustion engines. The second contract, between the processor and the generator of the waste oil, does not list Taxpayer as a party. . . . Again, the contract does little more than identify the contents "as hazardous recyclable material" consisting of used oil from motor vehicles and trucks as well as oil from industrial machinery and heavy duty equipment that will be used as a fuel for industrial boilers.

Taxpayer also provided the four sample "Manifests" for shipment of the waste oil from [outside the country] to the processor in [Washington]. Taxpayer claims that the manifests served as invoices. Each manifest lists Taxpayer as the "Carrier", the generator of the waste . . . as the "Consignor" and the processor in [Washington] as the "Intended consignee." All sample manifests provided were for deliveries that Taxpayer made during the audit period. Each manifest described the item as either: "waste oil (Non-TDG regulated)", "waste oil (Bunker Fuel – non regulated)", "waste lube oil," or simply "waste oil."

In addition, Taxpayer provided two "Straight Bills of Laiding."[4] . . . Other than these shipping manifests and agreements regarding transportation, no written contracts exist between Taxpayer and the generators and processors of the waste oil or the end consumer. Taxpayer had only oral agreements in place with its customers and with the generators of the waste oil regarding price.

With regard to the assessment for use tax and/or deferred sales tax, the Audit Division found that Taxpayer did not have receipts to show that it paid retail sales tax on trucks and trailers purchased in 2005 . . . . The Audit Division also found that Taxpayer purchased trucks and trailers in 2004 with a depreciated value of $. . . on January 1, 2005. Consequently, for tax period 2005, the Audit Division assessed use tax and/or deferred sales tax on a total value of $. . . . During tax period 2006, Taxpayer purchased another $. . . in trucks and trailers without documentation of retail sales tax paid. During tax period 2007, Taxpayer purchased $. . . without documentation of retail sales tax paid.

Although Taxpayer held an ICC permit that may have entitled it to an exemption from the use tax as a "for hire" motor carrier in interstate commerce under RCW 82.12.0254 and WAC 458-20-17401, the Audit Division found that Taxpayer's trucks and trailers were not exempt because Taxpayer had not proved that its vehicles were used "in substantial part" in interstate hauling for hire. Taxpayer failed to provide the Audit Division with detailed trip records to prove mileage, border crossings, and ownership of goods. The Audit Division further determined that

---

[4] According to Black's Law Dictionary at 159 (7th ed. 1999), a "bill of lading" is "[a] document of title acknowledging receipt of goods by carrier or by the shipper's agent; a document that indicates the receipt of goods for shipment and that is issued by a person engaged in the business of transporting or forwarding goods." Whereas, a "straight bill of lading" is a nonnegotiable bill of lading that specifies a consignee to whom the carrier is contractually obligated to deliver the goods. – Also termed a nonnegotiable bill of lading." *Id.* at 160. (A consignee is defined as "[o]ne to whom goods are consigned." "Consign" means "1. To transfer to another's custody or charge. 2. To give (goods) to a carrier for delivery to an intended recipient. 3. To give (merchandise or the like) to another to sell, use with the understanding that the seller will pay the owner for the goods from the proceeds." *Id.* at 303).

Taxpayer's border crossings . . . to pick up waste oil and deliver it to [Washington] were not transportation "for hire" because Taxpayer was transporting its own goods.

At the time of the appeal hearing on this matter, Taxpayer stated that all of its trucks and trailers are used for in-state and interstate commerce. . . . However, Taxpayer stated that it does not track where each truck goes, so it cannot provide documentation to show that any one truck is used in substantial part in interstate commerce.

Thus, Taxpayer's only argument on appeal is that it does not owe use tax and/or deferred sales tax because it claims to have paid retail sales tax on seven of the twelve trucks. Taxpayer states that it obtained its ICC permit in 2004. With the ICC permit, Taxpayer says the seller does not collect retail sales tax at the time of purchase. Taxpayer was given additional time to provide receipts or other documentation to show that it paid the retail sales tax, but no records were provided. Taxpayer also stated at the hearing that during the audit years, 70% of its business was picking up waste oil [from outside the country].[5]

ANALYSIS

Washington law imposes a hazardous substance tax (HST) on "the privilege of possession of hazardous substances in this state." RCW 82.21.030; *see also* Det. No. 99-305, 21 WTD 114 (2002). HST is currently assessed at the rate of .007 of the wholesale value of the hazardous substance. RCW 82.21.030(1). The purpose underlying the intent of the hazardous substance tax is twofold. *Tesoro Ref. and Mktg. v. Dep't of Revenue*, 164 Wn.2d 310, 321, 190 P.2d 28, 34 (2008) (citing RCW 82.21.010); *see also* Det. No. 03-0224E, 24 WTD 36 (2005). First, the Legislature sought to tax the first possession of all products that the Department of Ecology designates as hazardous substances. *Tesoro*, 164 Wn.2d at 319.[6] Second, the intent was to tax the possession only once. *Id.*

Is Waste Oil a Hazardous Substance?

[1] For the purposes of imposing HST, the statute defines "hazardous substance" to include the following:

[5] In the same schedule, Taxpayer also disputes a use tax/deferred sales tax assessment on $. . . property improvements on June 10, 2007. Taxpayer said he wasn't sure of the basis for the assessment, although it had no further argument for why it does not owe the tax. According to the Audit Division, the source of the income for the use tax assessment came from Taxpayer's depreciation schedule on its 1120 Federal Income Tax Return (asset #23), its fixed assets general ledger, and vendor invoices.

[6] The Legislature adopted the original hazardous substance tax, which was codified as chapter 82.22 RCW, effective January 1, 1988. Laws of 1987, 3d Ex. Sess., ch. 2, §§ 44-48 & 62. (SB 6085). On November 8, 1988, the voters approved Initiative No. 97, the Model Toxics Control Act, which repealed chapter 82.22 RCW, but did not change the statement of intent or most of the definitions of the original HST law.

> (a) Any substance that, on March 1, 2002, 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), . . .
>
> *(b) Petroleum products;*
>
> (c) Any pesticide product required to be registered under section 136a of the federal insecticide, fungicide and rodenticide act, 7 U.S.C. Sec. 136 et seq., as amended by Public Law 104-170 on August 3, 1996; and
>
> (d) Any other substance, category of substance, and any product or category of product determined by the director of ecology by rule to present a threat to human health or the environment if released into the environment. The director of ecology shall not add or delete substances from this definition more often than twice during each calendar year. For tax purposes, changes in this definition shall take effect on the first day of the next month that is at least thirty days after the effective date of the rule. …

RCW 82.21.020(1) (emphasis added).

For the purposes of the HST, "petroleum product" means:

> plant condensate, lubricating oil, gasoline, aviation fuel, kerosene, diesel motor fuel, benzol, fuel oil, residual oil, liquefied or liquefiable gases such as butane, ethane, and propane, and every other product derived from the refining of crude oil, but the term does not include crude oil.

RCW 82.21.020(2). WAC 458-20-252 (Rule 252), addresses the application of the HST, and contains parallel definitions for "hazardous substance" and "petroleum product." Rule 252(2)(b) and (d). "Product(s)" for petroleum product purposes, includes "any item(s) containing a combination of ingredients, some of which are hazardous substances and some of which are not hazardous substances." Rule 252(2)(c).

Waste oil is not specifically listed as a petroleum product. However, the waste oil that Taxpayer buys from the [out-of-country] generators and transports into Washington consists of used lube oil and "lubricating oil" is listed as a petroleum product. In addition, Taxpayer's waste oil also includes used bunker fuel, which is a product "derived from the refining of crude oil." *See* Det. No. 96-031, 17 WTD 040 (1996) ("Bunker fuel is …used to power ships and is the 'bottom of the barrel' in the crude oil refinement process. It is the residue remaining after all other more valuable products… have been skimmed off.") Therefore, the waste oil consisting of used lube oil and bunker fuel is a "petroleum product" within the meaning of the statute and rule and, therefore, a "hazardous substance" subject to HST.

. . . Taxpayer also attempts to make the argument that waste oil is not a product because it is waste. We do not find this argument persuasive, as waste oil clearly falls within the definition of "product" in Rule 252(2)(c), which is "any item(s) containing a combination of ingredients, some of which are hazardous substances and some of which are not hazardous substances." Rule 252(2)(c).

Was Taxpayer "First Possessor" of a Hazardous Substance in Washington

[2] As stated above, the Legislative intent of the HST is to "impose a tax only once for each hazardous substance possessed in this state and to tax the *first possession* of all hazardous substances . . ." RCW 82.21.010 (emphasis added). "Possession" means the control of a hazardous substance located within this state and includes both actual and constructive possession. RCW 82.21.020(3).[7] In *Tesoro,* the Washington Supreme Court stated that the "essence of possession revolves around the idea of control." 164 Wn.2d at 317. "Control" is defined in the statute as "the power to sell or use a hazardous substance or to authorize the sale or use by another." *Id.* (citing RCW 82.21.020(3). In short, having the power to sell or use a petroleum product subjects an entity to HST as the first possessor. *Id.*

Taxpayer argues that even if the waste oil is a "hazardous substance," it does not owe HST because it is not the "first possessor." Taxpayer contends that it merely transports the oil from the [out-of-country] generator to the processor in [Washington], and then transports it from the processor to the end consumer. Taxpayer claims that it is the processer that actually has first possession of the oil. Taxpayer also relies on the fact that for environmental regulatory purposes for the management of used oil, Department of Ecology treats it as the "transporter" of the waste oil (as opposed to the generator).

Regardless of how the Department of Ecology labels Taxpayer for the purposes of management of used oil to prevent hazardous spills and environmental contamination; the Legislature has chosen to impose HST tax on the "first possessor," which is defined as the one with the power to sell or use the petroleum product. In this case, Taxpayer had control over the goods when it purchased the waste oil, paid for the waste oil (even if at a later date), had it recycled in Washington, and sold the recycled product to the end consumer after processing. Taxpayer also had first actual physical possession of the goods in Washington when it transported the goods into our state . . . . Therefore, we conclude that Taxpayer is liable for the HST as the first possessor of the waste oil in Washington.

Use Tax on "ICC" Vehicles

[3] Washington has both a retail sales tax and a use tax. Retail sales tax is an excise tax imposed on consumers when they buy tangible personal property. RCW 82.04.050; 82.04.190; 82.08.020; 82.08.050. The use tax is a "compensating" tax; it is imposed when the sales tax has not been paid. *See Henneford v. Silas Mason Co.*, 300 U.S. 577, 57 S.Ct. 524, 81 L. Ed. 814 (1937); *Northern Pacific Railway Co. v. Henneford,* 9 Wn.2d 18, 113 P.2d 545 (1941). The use tax imposes a tax "for the privilege of using within this state as a consumer any article of tangible personal property purchased at retail" on which Washington's retail sales tax has not been paid, unless an exemption is available. RCW 82.12.020.

The Department's administrative rules explain that the:

---

[7] "Actual possession" occurs when the person with control has physical possession. RCW 82.21.020(3). "Constructive possession" occurs when the person with control does not have physical possession. *Id.*

> The use tax complements the retail sales tax by imposing a tax of like amount upon the use within this state as a consumer of any tangible personal property purchased at retail, where the user has not paid retail sales tax with respect to the purchase of the property used. (See also WAC 458-20-178). If the seller fails to collect the appropriate retail sales tax, the purchaser is required to pay the retail sales or use tax directly to the department unless the purchase and/or use is exempt from the retail sales and/or use tax.

WAC 458-20-17401(2) (Rule 17401).

The Legislature has chosen to exempt private carriers from use tax if the carrier's business is conducting interstate commerce by transporting property for hire. Det. No. 04-0075, 25 WTD 95 (2006) (citing RCW 82.12.0254). RCW 82.12.0254(3) states in pertinent part:

> The provisions of this chapter do not apply in respect to the use by the holder of a carrier permit issued by the interstate commerce commission or its successor agency of any motor vehicle or trailer whether owned by or leased with or without driver to the permit holder and used in substantial part in the normal and ordinary course of the user's business for transporting therein persons or property for hire across the boundaries of this state; . . .

Rule 17401 implements the statutory exemption from use tax for motor vehicles, trailers, and parts used in interstate or foreign commerce. Rule 17401(3)(b) explains that RCW 82.12.0254 provides a use tax exemption for the use of any motor vehicle or trailer owned or operated by a "for hire" motor carrier engaged in interstate or foreign commerce if both of the following conditions are met:

> (i) The user is, or operates under contract with, a holder of a carrier permit issued by the Interstate Commerce Commission (ICC) or its successor agency; and
>
> (ii) The vehicle is used in substantial part in the normal and ordinary course of the user's business for transporting therein persons or property for hire across the boundaries of the state.[8]

We agree with the Audit Division that Taxpayer's border crossings . . . to pick up waste oil and deliver it to [Washington] were not transportation "for hire" because Taxpayer purchased the product for resale.

---

[8] Rule 17401(3)(b)(ii) further provides that "in substantial part" means "that the motor vehicle or trailer for which exemption is claimed actually crosses Washington boundaries and is used a minimum of twenty-five percent in interstate hauling for hire." The motor carrier must also "continue to substantially use the motor vehicle or trailer in interstate for hire hauls during each calendar year to retain the exemption from use tax. This requires that at the start of each calendar year the carrier review the usage of each vehicle and trailer for a 'view period' consisting of the previous calendar year." Rule 17401(3)(c).

As for Taxpayer's argument that it does not owe use tax and/or deferred sales tax because it claims to have paid retail sales tax on seven of the twelve trucks. Taxpayer did not provide any documentation in support of its claim. Thus, we conclude that the Audit Division properly assessed use tax and/or deferred sales tax on Taxpayer's trucks and trailers purchased during the audit period without payment of retail sales tax. Taxpayer's petition is denied.

DECISION AND DISPOSITION

Your petition is denied.