

Cite as Det. No. 19-0052, 40 WTD 150 (2021)

BEFORE THE ADMINISTRATIVE REVIEW AND HEARINGS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition for Correction of)	<u>D E T E R M I N A T I O N</u>
Assessment of)	
)	No. 19-0052
)	
...)	Registration No. . . .
)	

RCW 82.21.030; WAC 458-20-252(3) – Hazardous substance tax. The hazardous substance tax is imposed on the wholesale value of the substance listed as a hazardous substance in 42 U.S.C. § 9601.

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 THE CASE

Gabriella Herkert, T.R.O. – A manufacturer of cancer treatment drugs protests imposition of hazardous substance tax on personalized brachytherapy radiation products that Taxpayer makes from [radioisotope], a hazardous substance. We grant Taxpayer’s petition and remand the case to the Audit Division for adjustment.¹

ISSUE

What is the measure of hazardous substance tax (HST) on the products that contain [radioisotope] under RCW 82.21.030 and WAC 458-20-252?

FINDINGS OF FACT

[Taxpayer] designs, develops, and produces personalized brachytherapy products for treating cancer from its headquarters in Washington. Taxpayer’s proprietary manufacturing process creates isotope-based medical products which place radiation sources (seeds) close to the site of tumors to destroy cancer cells. Taxpayer used a medical isotope, . . . , in the production of seeds. Taxpayer also produces pre-loaded needles with the seed inserted in them. Taxpayer’s suppliers of the [radioisotope] used in production are out-of-state. To produce seeds, Taxpayer chemically separates [radioisotope] to produce a 99.9% pure isotope. The pure isotopes are absorbed onto a ceramic core containing a gold X-ray marker. Taxpayer inserts the core into a titanium capsule

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

that is then welded shut resulting in a sealed radioactive source and biocompatible medical device. Taxpayer sells the seeds to health care professionals and facilities at wholesale.

The Department of Revenue's (Department) Audit Division (Audit) reviewed Taxpayer's books and records for the tax period January 1, 2013, through December 31, 2016, including sales records of Taxpayer's products incorporating [radioisotope] sold at wholesale. The Department assessed Taxpayer \$. . . for the tax period January 1, 2013, through December 31, 2016.² In its assessment, Audit imposed the hazardous substance tax on the value of seeds and pre-loaded needles sold to third parties at wholesale. Taxpayer timely requested review.

Taxpayer concedes that it owes hazardous substance tax, but contends that the appropriate measure of the hazardous substance tax is the value of [radioisotope] purchased by Taxpayer and used in its end products. During its request for review, Taxpayer provided a sample selection of purchase invoices for [radioisotope] it purchased from unrelated out of state suppliers. Taxpayer also provided a spreadsheet with a proposed calculation of the total amount of [radioisotope] purchases based on the sample without providing all purchase invoices for [radioisotope] during the tax period.

ANALYSIS

The State of Washington imposes a tax once for each hazardous substance possessed in this state. RCW 82.21.030; WAC 458-20-252(3). The hazardous substance tax is imposed on the wholesale value of the hazardous substance. *Id.* The hazardous substance tax is imposed upon the privilege of possessing a hazardous substance in this state at the rate of seven-tenths of one percent (.007). WAC 458-20-252(3).

"Hazardous substance" is defined to include:

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), as amended by Public Law 99-499 on October 17, 1986, except that hazardous substance does not include the following noncompound metals when in solid form in a particle larger than one hundred micrometers (0.004 inches) in diameter: Antimony, arsenic, beryllium, cadmium, chromium, copper, lead, nickel, selenium, silver, thallium, or zinc;

RCW 82.21.020(1).³

42 U.S.C. § 9601(101)(14) defines "hazardous substance" as:

² Document . . . includes \$. . . in use tax and/or deferred sales tax, \$. . . in hazardous substance tax, \$. . . in interest and \$. . . in 5% assessment penalty. Taxpayer does not dispute its use tax and/or deferred sales tax, nor the interest and penalties associated with it.

³ ["Effective July 1, 2019, ESSB 5993 (2019) amended RCW 82.21.010 and 82.21.030, making this rate applicable only to non-petroleum products and products specifically excluded from the volume-based hazardous substance tax imposed on petroleum products."]

- (A) any substance designated pursuant to section 311(b)(2)(A) of the Federal Water Pollution Control Act [33 U.S.C. § 1321(b)(2)(A)],
- (B) any element, compound, mixture, solution, or substance designated pursuant to section 9602 of this title,
- (C) any hazardous waste having the characteristics identified under or listed pursuant to section 3001 of the Solid Waste Disposal Act [42 U.S.C. § 6921] (but not including any waste the regulation of which under the Solid Waste Disposal Act [42 U.S.C. § 6901 et seq.] has been suspended by Act of Congress),
- (D) any toxic pollutant listed under section 307(a) of the Federal Water Pollution Control Act [33 U.S.C. § 1317(a)],
- (E) any hazardous air pollutant listed under section 112 of the Clean Air Act [42 U.S.C. § 7412], and,
- (F) any imminently hazardous chemical substance or mixture with respect to which the Administrator has taken action pursuant to section 7 of the Toxic Substances Control Act [15 U.S.C. § 2606]. The term does not include petroleum, including crude oil or any fraction thereof which is not otherwise specifically listed or designated as a hazardous substance under subparagraphs (A) through (F) of this paragraph, and the term does not include natural gas, natural gas liquids, liquefied natural gas, or synthetic gas usable for fuel (or mixtures of natural gas and such synthetic gas).

42 U.S.C. § 9601(101)(14) includes an appendix that lists materials and their corresponding reportable quantities that are listed or designated as “hazardous substances” under section 101(14) of the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. 9601(14) (CERCLA). 42 U.S.C. § 9601 *et seq.* [radioisotope] is listed in that appendix.⁴ The appendices to CERCLA list neither seeds nor needles nor any other product separate from the [radioisotope] listing. *See* 42 U.S.C. 9601 *et seq.*

WAC 458-20-252 explains when certain hazardous substances combined with another non-hazardous substance create a new hazardous substance. For example, petroleum products are hazardous substances under WAC 458-20-252(2)(b)(iii). “Product(s)” is then defined to include “any item(s) containing a combination of ingredients, some of which are hazardous substances and some of which are not hazardous substances.” WAC 458-20-252(2)(c). This does not apply to other hazardous substances, such as those designated as hazardous under CERCLA. WAC 458-20-252(2)(b)(i) explains the following with regards to products containing nonhazardous substances and hazardous substances under CERCLA: “Combinations of CERCLA substances as ingredients together with nonhazardous substances will not be taxable unless the end product is specifically designated as a hazardous substance by the department of ecology.”

[Radioisotope] is listed as a hazardous substance in the CERCLA Appendix. Seeds and needles containing [radioisotope] are not.⁵ The Department of Ecology has not listed any of the end

⁴ Appendix A, Table 2, Radionuclides, https://www.phmsa.dot.gov/sites/phmsa.dot.gov/files/docs/172_101_appa.pdf (Last viewed February 15, 2019).

⁵ Compare Det. No. 10-0027, 29 WTD 53 (2010) which concluded that the combination of a hazardous substance, gasoline, combined with a non-hazardous substance, denatured ethanol, was in itself a hazardous substance because

products in this case as hazardous substances. In Det. No. 88-145, 5 WTD 141 (1988), the Department held that under the provisions of WAC 458-20-252, since carbon dioxide was not specifically listed as a hazardous substance under CERCLA or FIFRA, it could only be a hazardous substance if it was a petroleum product since the use of the word “product” implied that a combination of listed hazardous substances and non-hazardous substances remained hazardous for the purpose of WAC 458-20-252. Likewise, seeds and needles are not listed in CERCLA as hazardous substances. While [radioisotope] is a hazardous substance, its combination with non-hazardous materials does not render the combination hazardous. Therefore, the hazardous substance in this case is [radioisotope] and not products manufactured by Taxpayer incorporating [radioisotope].

The hazardous substance tax is imposed upon any possession of a hazardous substance or product in this state by any person who is not expressly exempt of the tax. WAC 258-20-252(1)(c). It is the intent of the law that the economic burden of the tax should fall upon the first such possession in this state. *Id.* The tax measure or base is the wholesale value of the substance, as defined in WAC 458-20-252(3). “‘Wholesale value’ means fair market wholesale value, determined as nearly as possible according to the wholesale selling price at the place of use of similar substances of like quality and character, in accordance with rules of the department.” RCW 82.21.020(5); WAC 458-20-252(5).

Taxpayer purchased [radioisotope] from an unaffiliated third party located out-of-state. The purchase price paid for the [radioisotope] was the fair market wholesale value determined according to the wholesale selling price of the hazardous substance, [radioisotope]. While Audit calculated the wholesale selling price of seeds and needles incorporating [radioisotope], those products are not similar substances of like quality and character to the [radioisotope] sold at fair market value to Taxpayer. The [radioisotope] sold to Taxpayer is but a component of its end products.

WAC 458-20-252(3) supports Taxpayer’s contention that the hazardous substance tax is intended to be imposed on Taxpayer’s first possession of the hazardous substance, [radioisotope], in this state. Taxpayer’s first possession occurs when Taxpayer purchases [radioisotope] for incorporation in its products. Taxpayer has provided some records to establish the fair market wholesale value determined according to the wholesale selling price it paid for the [radioisotope] from unrelated out of state suppliers. We grant Taxpayer’s petition on the issue that hazardous substance tax is only imposed on the hazardous substance itself. We are remanding the case to the Audit Division to provide Taxpayer an opportunity to provide the Audit Division with records to prove the wholesale value of the [radioisotope] it purchased and possessed in Washington.

DECISION AND DISPOSITION

We are remanding the case to the Audit Division (Operating Division) for possible adjustment

Dated this 22nd day of February 2019.

the definition of hazardous substances include “petroleum products.” No such product language exists with respect to the CERCLA list of radionuclide hazardous substances.