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NO. 79661-1

SUPREME COURT OF THE STATE OF WASHINGTON

TESORO REFINING AND MARKETING COMPANY,

Appellant,

v.

STATE OF WASHINGTON, DEPARTMENT OF REVENUE,

Respondent.

**ANSWER TO MEMORANDUM OF AMICUS CURIAE
WESTERN STATES PETROLEUM ASSOCIATION
IN SUPPORT OF PETITION FOR REVIEW**

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I. INTRODUCTION

Western States Petroleum Association (WSPA) has not presented a basis for accepting review under RAP 13.4(b). The Court of Appeals carefully considered the language and intent of RCW 82.21, and found no ambiguity in the law. The Court of Appeals followed the longstanding decisions of this Court, and ruled that even if the Department of Revenue had read the plain language in a different manner, it would not be relevant. The courts retain the ultimate authority to apply the law, and administrative agencies have no authority to alter or amend the plain language of a statute.

Since there is abundant case law supporting the basic rules of statutory construction presented in this case, and absolutely no conflict in the court decisions, there is no basis for review.

II. ARGUMENT

A. The Hazardous Substance Tax Statutes Are Unambiguous.

Each of WSPA's arguments depend on acceptance of their vague statement that RCW 82.21 is ambiguous. Since they do not point to any specific language, it is impossible to determine what WSPA is referring to. Unlike the WSPA, the Court of Appeals carefully considered RCW 82.21 and found no ambiguity. RCW 82.21.030(1) taxes "the privilege of possession of hazardous substances in this state." "Hazardous substance" is defined to include all "petroleum products," including even "plant

condensate.”¹ As a petroleum product, refinery gas falls within the plain language of the statutory definition of a hazardous substance.²

The definition of “possession” is equally clear. RCW 82.21.030 states that when there is physical possession and “the power to sell **or** use” the hazardous substance, possession exists. Given its plain meaning, “or” is read in the disjunctive.³ This Court has repeatedly stated that statutory construction of “or” is appropriate “only when the language of the statute is ambiguous.”⁴ Since the Court of Appeals did not find any ambiguity in the law, it read “or” in the disjunctive, and upheld the finding that Tesoro possesses the refinery gas it pipes through the refinery for use as a fuel.⁵

A prior version of the hazardous substance tax law contained precisely the exemption requested by Tesoro and WSPA. Formerly, “liquid fuel or fuel gas used in petroleum processing” was not subjected to

¹RCW 82.21.020(1)(b). The definition of a “petroleum product” includes “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**”. RCW 82.21.020(2) (emphasis added). Although possessing minimal amounts of a hazardous substance is one of the six statutory exemptions from the tax, the exemption does not apply to petroleum products. RCW 82.21.040.

²WSPA states that applying the hazardous substance tax only to companies that pollute would be “fair.” Brief of WSPA at 3. There is absolutely no support for this in the law. RCW 82.21.030 is not conditioned on a finding that a taxpayer has polluted.

³*Agrilink Foods, Inc. v. Dep’t of Revenue*, 153 Wn.2d 392, 397, 103 P.3d 1226 (2005).

⁴*State v. Judge*, 100 Wn.2d 706, 711, 675 P.2d 219 (1984); *Childers v. Childers*, 89 Wn.2d 592, 596, 575 P.2d 201 (1978), citing *State v. Tiffany*, 44 Wash. 602, 87 Pac. 932 (1906); *Cerrillo v. Esparza*, 158 Wn.2d 194, 204, 142 P.3d 155 (2006); *Concerned Ratepayers Ass’n v. Pub. Util. Dist. No. 1 of Clark Co.*, 138 Wn.2d 950, 959-60, 983 P.2d 635 (1999); *State v. Bolar*, 129 Wn.2d 361, 365-66, 917 P.2d 125 (1996).

⁵Use of refinery gas is extremely valuable to Tesoro. When it does not create enough refinery gas, Tesoro must purchase and pipe in natural gas to operate the refinery. CP 163, 166-7 (Crawford Dep. at 23, 26 – 27).

tax.⁶ In 1989, Initiative 97 amended the law and eliminated the exemption for liquid fuel or fuel gas used in petroleum processing.⁷

The case law consistently states that when there is no ambiguity in the statutes, the plain language is applied. “In judicial interpretation of statutes, the first rule is ‘the court should assume that the legislature means exactly what it says. Plain words do not require construction.’”⁸ In essence, WSPA is requesting that review be accepted to add a new exemption from the hazardous substance tax. This Court repeatedly has cautioned that, “[t]he court will not read into a statute matters which are not there nor modify a statute by construction.”⁹ Since WSPA has not identified any ambiguity in the law, or cited any cases that conflict with this Court’s longstanding assertion that administrative rules do not alter the Court’s authority to read and apply the plain language of the law, there is no basis for review under RAP 13.4(b).

B. There Is No Support for WSPA’s Claim that Rule 252 Amended the Plain Language of RCW 82.21.

Since no ambiguity was found in the law, the Court of Appeals properly applied the plain language. Turning away from the plain language, and considering an administrative rule and an agency’s interpretation of the law, would have been appropriate only if the law were

⁶ Laws of 1987, 3d Ex. Sess., ch. 2 § 47(3).

⁷ Laws of 1989, ch. 2 § 24, effective March 1, 1989.

⁸ *Western Telepage, Inc. v. City of Tacoma Dep’t of Fin.*, 140 Wn.2d 599, 609, 998 P.2d 884 (2000), quoting *State v. McCraw*, 127 Wn.2d 281, 288, 898 P.2d 838 (1995).

⁹ *In re Estate of Hansen*, 128 Wn.2d 605, 610, 910 P.2d 1281 (1996), quoting *King Cy. v. City of Seattle*, 70 Wn.2d 988, 991, 425 P.2d 887 (1967).

ambiguous. As reflected in the Court of Appeals decision, the outcome of the case would have been the same either way, because WAC 458-20-252 administers the hazardous substance tax in a manner consistent with the plain language of the law.

1. Administrative agencies do not receive deference when the law is plain and unambiguous.

Without exception, this Court has uniformly held that when the law is unambiguous, the authority to interpret the plain language of the law rests with the courts, not administrative agencies.

This longstanding rule was recently reiterated in *Bostain v. Food Express, Inc.*, No. 77201-1, 2007 WL 611259 (Mar. 2007). In *Bostain*, this Court considered whether a truck driver is entitled to overtime pay if some hours are worked outside Washington. The Court held that under the plain language of the state minimum wage laws, employers must pay overtime for hours worked both inside and outside the state. The Court confirmed that when the law is plain and unambiguous, the analysis ends there.¹⁰ The Court rejected the Court of Appeals' reliance on an administrative rule stating that overtime is paid only for time worked in Washington. The Court made it clear that "no deference is due the agency's interpretation, regardless of whether it is stated in an agency rule."¹¹ When the language is unambiguous, "this court has the ultimate authority to interpret a statute."¹²

¹⁰ *Bostain*, 2007 WL 611259 at 9.

¹¹ *Id.* at 10.

¹² *Id.*

The *Bostain* decision is consistent with a long line of cases in which this Court has stated that administrative rules and agency interpretations of the law are irrelevant when the statutory language is unambiguous.¹³ The Department of Revenue does not possess any special powers that exempt it from this rule. As this Court firmly stated in *Agrilink Foods, Inc. v. Dep't of Revenue*, 153 Wn.2d 392, 103 P.3d 1226 (2005), if the Department of Revenue's reading of the law conflicts with the Court's, it does not prevent the Court from applying the plain language of the statutes. "[A] statute is not ambiguous merely because different interpretations are conceivable."¹⁴

2. Rule 252(7)(b) is consistent with the hazardous substance tax.

If it were appropriate to defer to Rule 252, despite the fact that the statutory language is unambiguous, it would not alter the result in this case. On the contrary, the rule supports the Court of Appeal's holding.

WSPA claims Rule 252 contradicts the law, and restores the repealed exemption for petroleum products used as fuel. This interpretation is possible only if RCW 82.21 is ignored. As the Court has made clear, "[r]ules must be written within the framework and policy of

¹³ *E.g.*, *Edelman v. State ex rel. Pub. Disclosure Comm'n*, 152 Wn.2d 584, 591, 99 P.3d 386 (2004); *Waste Mgmt. of Seattle, Inc. v. Util. & Transp. Comm'n*, 123 Wn.2d 621, 627-28, 869 P.2d 1034 (1994); *Bird-Johnson Corp. v. Dana Corp.*, 119 Wn.2d 423, 428, 833 P.2d 375 (1992); *Kitsap-Mason Dairymen's Ass'n v. State Tax Comm'n*, 77 Wn.2d 812, 815, 467 P.2d 312 (1970).

¹⁴ *Agrilink*, 135 Wn.2d at 396, quoting *State v. Hahn*, 83 Wn. App. 825, 831, 924 P.2d 392 (1996).

the applicable statutes.”¹⁵ RCW 82.21.030 imposes the hazardous substance tax only on the first possession. RCW 82.21.020 provides a list of six specific exemptions from the tax, including “successive possession of a previously taxed substance.” Consistent with the statutes, Rule 252(7)(b) administers the law by collecting the tax only once:

(b) When any hazardous substance(s) is first produced during and because of any physical combination or chemical reaction which occurs in a manufacturing or processing activity, the intermediate possession of such substance(s) within the manufacturing or processing plant is not considered a taxable possession if the substance(s) becomes a component or ingredient of the product being manufactured or processed or is otherwise consumed during the manufacturing or processing activity.

Contrary to WSPA’s assertions, the Court of Appeals did not read the rule’s title in isolation, and taxpayers are not expected to do so either. Rather, the Court of Appeals read the text of WAC 458-20-252 in conjunction with RCW 82.21’s assessment of tax on the “first possession” of a hazardous substance. As the Court of Appeals noted, read in conjunction with the law, Rule 252(7)(b) “is intended to set the timing of the taxing incident and avoid double taxation.”¹⁶ The Court of Appeals agreed with the Department of Revenue that since Tesoro possesses refinery gas only once, RCW 82.21 and Rule 252(7)(b) do not exempt the possession from tax.¹⁷

¹⁵ *Kitsap-Mason Dairymen’s Ass’n*, 77 Wn.2d at 815, citing *State ex rel. West v. City of Seattle*, 50 Wn.2d 94, 309 P.2d 751 (1957), *Pringle v. State*, 77 Wn.2d 569, 464 P.2d 425 (1970), *Pierce Cy. v. State*, 66 Wn.2d 728, 404 P.2d 1002 (1965)

¹⁶ *Tesoro Ref. & Mktg. Co. v. Dep’t of Revenue*, 135 Wn. App. 411, 425-26, 144 P.3d 368 (2006).

¹⁷ *Id.* at 426.

Tesoro's possession of a hazardous substance is clearly subject to tax under both the law and the rule. The facts of this case are unquestioned. Tesoro creates refinery gas for use as a fuel to heat its steam plant and refinery units. The gas heats the outside of the boiler unit. A chemical reaction occurs inside the boiler, but the refinery gas is never part of that reaction.¹⁸ Since the fuel is never used as an ingredient in other products, there is no risk of the refinery gas being taxed twice --- first as refinery gas, and then again as an ingredient of another product.

The Department of Revenue applies Rule 252(7)(b) in a manner consistent with the underlying law. It does not intend to legislate by restoring the repealed exemption for fuel gas used in petroleum processing. In fact, had the Department of Revenue read its rule in the manner advocated by WSPA, Tesoro would not have been required to pay the tax.

C. The Department of Revenue is not seeking to “impeach” Rule 252(7)(b).

WSPA contends the Department of Revenue is trying to “impeach” its own rule. As stated above, the Department of Revenue agrees with the Court of Appeals that Rule 252(7)(b) is consistent with the underlying law, and does not attempt to restore the repealed tax exemption.

If, however, the Court of Appeals had found that Rule 252(7)(b) conflicts with the hazardous substance tax statutes, the law would still be controlling. “An agency may not promulgate a rule that amends or

¹⁸ CP 163 (Crawford Dep. at 23, lines 5-23.)

changes a legislative enactment.”¹⁹ When a rule conflicts with a law, the rule is invalid and the law stands unaltered.

This is more than a rule of statutory construction. It goes to the heart of the authority of the state legislature to enact tax laws and exemptions from taxation. As cases involving the tax law make clear, the legislature has not ceded this authority to the Department of Revenue. In *Coast Pacific v. Dep’t of Revenue*, 105 Wn.2d 912, 719 P.2d 541 (1986), this Court considered whether the Department of Revenue had enacted a rule expanding an exemption from the statutorily imposed business and occupation tax. The Court held that taxpayers were not entitled to rely on the administrative rule to obtain tax relief “beyond the exemptions provided by statute or required by the constitution The Department cannot contradict a substantive legislative enactment by administrative regulation.”²⁰

WSPA contends the decision in *Coast Pacific* is distinguishable from this case, because the rule at issue in this case only interprets the law, rather than attempting to amend it. *Coast Pacific* is directly applicable because the interpretation of Rule 252(7)(b) advocated by WSPA would act as an amendment of RCW 82.21. It would alter the law by reinstating the exemption for fuel gas used in petroleum processing, repealed by the voters in 1989.²¹

¹⁹ *Edelman*, 152 Wn.2d at 591.

²⁰ *Coast Pacific*, 105 Wn.2d at 917.

²¹ Laws of 1989, ch. 2 § 24, effective March 1, 1989.

As this Court stated in *Budget Rent-A-Car v. Dep't of Revenue*, 81 Wn.2d 171, 500 P.2d 764 (1972), taxpayers cannot rely on rules that conflict with the law, because “the department is without authority to amend the statute by regulation.”²² The Court recently reinforced this point in *Bostain*, stating that “[r]ules that are inconsistent with the statutes they implement are invalid.”

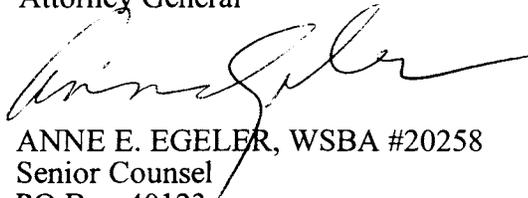
III. CONCLUSION

WSPA has not raised a basis for review under RAP 13.4(b). The Court of Appeals properly applied the longstanding rules of statutory construction, in keeping with the decisions of this Court. There is ample appellate case law applying the basic rules presented in this case.

Therefore, the request for review should be denied.

RESPECTFULLY SUBMITTED this 13th day of April, 2007.

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²² *Budget Rent-A-Car*, 81 Wn.2d at 176.

