



FOSTER PEPPER PLLC

Memorandum

To: Shelia Gall, General Counsel
Association of Washington Cities

From: Hugh D. Spitzer *HDS*
Michael S. Schechter *MSS*

Date: March 5, 2010

Subject: SSHB 3181: Analysis of the 18th Amendment's Highway Purposes
Restriction to the Hazardous Substance Possession Tax

This memorandum addresses the specific issue of whether the tax proposed in Second Substitute House Bill 3181 ("SSHB 3181") is a "gas tax" under the 18th Amendment to the Washington Constitution (Article II, §40) and is subject to the restriction on gas tax use to "highway purposes." Our analysis is that the SSHB 3181 proposal, like the existing hazardous substance possession tax in RCW 82.21.030, is not a "gas tax," and therefore the funds collected on motor vehicle fuels under the proposed tax would not be subject to the 18th Amendment spending restriction.

The 18th Amendment, adopted in 1944, restricted the use of certain fees and taxes related to motor vehicles and motor vehicle fuel:

All fees collected by the State of Washington as license fees for motor vehicles and all excise taxes collected by the State of Washington **on the sale, distribution or use of motor vehicle fuel and all other state revenue intended to be used for highway purposes**, shall be paid into the state treasury and placed in a special fund to be used exclusively for highway purposes...

Provided, That this section shall not be construed to include revenue from general or special taxes or excises not levied primarily for highway purposes, or apply to vehicle operator's license fees or any excise tax imposed on motor vehicles or the use thereof in lieu of a property tax thereon, or fees for certificates of ownership of motor vehicles.

Wash. Const. Art. II, §40. (Emphasis added.)

When interpreting constitutional provisions, the Washington courts have held that language should be given its ordinary meaning, without extra words read in where no such words exist. “Rules of construction require that the language be given its ordinary meaning. The court may not engraft an exception where none is expressed in the constitution.” *Second Amendment Foundation v. City of Renton*, 35 Wn.App. 583, 585-586, 668 P.2d 596 (1983) (emphasis supplied).

The courts’ emphasis on ordinary meaning extends to all provisions of the constitution, including constitutional amendments. In an earlier 18th Amendment case analyzing use of highway funds, the State Supreme Court discussed how to interpret these provisions: “... we are here confronted with a constitutional limitation adopted by the people, which is to be understood as their words used in their ordinary meaning and not in any technical sense.” *Automobile Club of Wash. v. City of Seattle*, 55 Wn.2d 161, 167, 346 P.2d 695, 699 (1959). The State Supreme Court has also ruled that the language in the 18th Amendment is not ambiguous:

In any event, Const. art. II, § 40 (amend.18) “should be read according to the natural and most obvious import of its framers, without resorting to subtle and forced construction for the purpose of limiting or extending its operation.”

State ex rel. Heavey v. Murphy, 138 Wn.2d 800, 811, 982 P.2d 611 (1999).

SSHB 3181 proposes an additional tax on the “privilege of possession of hazardous substances,” essentially an increase to an identical tax first enacted in 1988 and codified at RCW 82.21.030. There has been no 18th Amendment or other constitutional challenge to RCW 82.21.030 during its twenty-plus years of operation, during which hundreds of millions of dollars of those taxes have been paid into the state’s model toxic control accounts.

In SSHB 3181, the proposed tax is on the “privilege of possession of hazardous substances”, possession being defined as “the control of a hazardous substance located within this state and includes both actual and constructive possession.” SSHB 3181, Sec. 3; RCW 82.21.020. Most motor vehicle fuels are hazardous substances for purposes of SSHB 3181. RCW 82.21.020.

In analyzing SSHB 3181’s relationship to the 18th Amendment, we look to the direction the courts have given us in interpreting statutory and constitutional language. Most of the purposes for which money collected under SSHB 3181 would be used are not “highway purposes” under the 18th Amendment. The primary question then is whether SSHB 3181 creates a tax that falls within those which the 18th Amendment requires to be used exclusively for highway purposes.

The 18th Amendment’s restriction applies only to taxes incurred on “the sale, distribution or use of motor vehicle fuel.” Reading the 18th Amendment plainly, and understanding the words in their ordinary meaning, a tax on the privilege of possessing, controlling and handling a hazardous substance is not a tax on the use, sale, or distribution of motor vehicle fuel. The following proviso, at the end of the 18th Amendment, further supports the understanding that the

State Legislature may tax the possession, handling and use of hazardous substances, including motor vehicle fuels, in a manner that does not require the funds to be restricted to highway purposes:

Provided, That this section shall not be construed to include revenue from general or special taxes or excises not levied primarily for highway purposes....

The plain meaning of this language, read together with the remainder of the 18th Amendment demonstrates that there are circumstances in which motor vehicle fuels could be taxed for non-highway purposes. Here, motor vehicle fuels happen to fall into a category of taxes levied on a much broader class (hazardous substances) for non-highway purposes. The 18th Amendment does not bar this tax collection nor does it require these funds to be used for highway purposes.

In a 2001 opinion, the Attorney General reviewed the 18th Amendment and associated case law and came to a similar conclusion, *i.e.*, that motor vehicle fuels may be taxed in a manner that does not require the funds to be used for highway purposes. 2001 AGO No. 2. For example, business and occupation (“B&O”) taxes are routinely collected on the sale of motor vehicle fuels, and have been since the 18th Amendment was adopted. B&O tax receipts have never been dedicated to highway purposes. 2001 AGO No. 2. As the Attorney General’s Opinion notes, the purpose of the 18th Amendment was primarily to prevent the diversion of so-called “gas tax” funds, that is, taxes imposed solely on motor vehicle fuels specifically for highway purposes. Similarly, the 18th Amendment does not impose restrictions on the application of all taxes that may happen to apply to motor vehicle fuels along with other hazardous commodities. This is reinforced by the fact that this tax is not imposed on distribution, use, or sale.

Motor vehicle tax restrictions in other state constitutions are not particularly helpful in understanding the 18th Amendment because those provisions contain language that is quite different from Washington’s. In fact, examining other state’s restrictions on motor vehicle funds show precisely how narrow the Washington restriction is. *See, e.g., Automobile Club of Oregon v. State*, 840 P.2d 674 (1992) (discussing Oregon’s constitutional restrictions on use of “Any tax levied on, with respect to, or measured by the storage, withdrawal, use, sale, distribution, importation or receipt of motor vehicle fuel or any other product used for the propulsion of motor vehicles;”).

In short, the application of receipts of the tax proposed in SSHB 3181 should be considered as constitutional with regard to the 18th Amendment of the Washington Constitution.