

Cite as Det. No. 13 WTD 39 (1993).

BEFORE THE INTERPRETATION AND APPEALS DIVISION  
DEPARTMENT OF REVENUE  
STATE OF WASHINGTON

In The Matter of the Petition	)	<u>F I N A L</u>
For Refund	)	<u>D E T E R M I N A T I O N</u>
	)	
	)	No. 91-323ER
	)	
. . .	)	Registration No. . . .
	)	
	)	

[1] RCW 82.08.0262, RCW 82.08.0261, RCW 82.12.0254, RULE 175: RETAIL SALES TAX EXEMPTION -- USE TAX EXEMPTION -- [VESSEL] -- THEREWITH -- STATUTORY CONSTRUCTION -- INTERSTATE AND FOREIGN COMMERCE -- WATERCRAFT. Taxpayer's [vessels] which do not themselves carry or haul cargo moving in interstate or foreign commerce must physically connect to other vessels carrying and moving cargo in interstate or foreign commerce and actually tow those vessels as part of a continuing movement of interstate and foreign commerce in order to satisfy the statutory requirement of conducting "interstate or foreign commerce by transporting therein or therewith property for hire." Det. No. 85-308A and 86-20A, 1 WTD 415 (1986).

[2] RCW 82.08.0262, RCW 82.08.0261, RCW 82.12.0254, RULE 175: BOUNDARY CROSSING -- TERRITORIAL WATERS -- WATERCRAFT EXEMPTIONS. The legislature did not include a boundary crossing requirement for watercraft in the language of the statutory exemptions, therefore taxpayer's [vessels] which tow or haul other exempt vessels exclusively within Washington territorial waters are not required to cross international or interstate boundaries as a condition for determining whether taxpayer's [vessels] are entitled to the sales and use tax exemptions. The question is not whether taxpayer is conducting interstate or foreign commerce but whether it is doing so by transporting property therewith. Citing, United Parcel Service v. Department of Revenue, 102 Wn.2d 355 (1984).

- [3] RCW 82.08.0262, RCW 82.08.0261, RCW 82.12.0254, RULE 175: [VESSELS]. [Vessels] must be used as an inseparable part of a continuing interstate or foreign movement of property for hire to be exempt from retail sales tax and use tax.
- [4] RULE 175: CARGO -- STATUTORY CONSTRUCTION. Use of the term "cargo" instead of "property" does not violate rules of statutory construction. Cargo refers to the property being transported by the exempt vessel/watercraft being towed. Statutory exemptions must be narrowly construed. United Parcel Service v. Department of Revenue, 102 Wn.2d 355, 360 (1984).
- [5] RCW 82.08.0262, RCW 82.08.0261, RCW 82.12.0254, Rule 175: [VESSEL] -- STAND BY -- ESCORT SERVICES. [Vessels] which do not physically connect to other exempt cargo-laden watercraft for the purpose of towing or hauling the other exempt watercraft is not "transporting property therein or therewith."
- [6] RCW 82.12.0254, RULE 175: PRIMARY USE -- TRANSPORTING FOR HIRE. Primary use must constitute 51% or more usage of each [vessel] in conducting interstate or foreign commerce by transporting property or persons therein or therewith for hire.

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.

TAXPAYER REPRESENTED BY: . . .

DATE OF HEARING: . . .

#### NATURE OF ACTION:

Taxpayer has requested executive level reconsideration of its original petition for refund of sales and use taxes paid on certain [vessels] purchased/leased and used by taxpayer to assist other vessels moving property in interstate and foreign commerce. The [vessels] at issue conduct these . . . assist and . . . escort activities wholly within Washington State territorial waters. The Department denied taxpayer's original refund petition.<sup>1</sup> Taxpayer claims that its petition warrants executive

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<sup>1</sup>Two related taxpayers filed the original petition. Both taxpayers requested correction of tax assessments. That portion of the petition was granted. This taxpayer also requested a

level review because it has industry-wide impact and is of first impression.<sup>2</sup> This matter received executive level consideration as evidenced by the signature of the Assistant Director, below.

FACTS:

Danyo, A.L.J. -- Taxpayer . . . owns or leases [vessels] operating both within and outside Washington territorial waters. Taxpayer claims that all of its [vessels] which conduct . . . assist and . . . escort activities wholly within Washington's territorial waters are exempt from sales and use taxes pursuant to RCW 82.08.0262 and 82.12.0254, respectively. This claim is based on the fact that the [vessels] provide these services to other exempt watercraft. Taxpayer's request for refund also covers taxes paid on component parts, maintenance and repair costs of the [vessels].<sup>3</sup> RCW 82.08.0261 and WAC 458-20-175 (Rule 175).

Taxpayer's request for reconsideration is limited to review of taxpayer's contention that the initial Determination appealed from, Det. No. 91-323 ("the Determination") erroneously interpreted the statutory exemptions on which taxpayer relied.<sup>4</sup> Taxpayer's challenge is limited, therefore, to questions of statutory construction of the retail sales tax (RCW 82.08.0262 and 82.08.0261) and the use tax (RCW 82.12.0254) exemptions. No other taxes or constitutional commerce clause questions are in issue.

The underlying facts and issues were set out in the initial Determination and will not be restated here, except as needed. Taxpayer's refund petition was denied because the Department found that the exemptions do not extend to taxpayer's [vessels] when they are merely assisting other watercraft which are exempt under the statutes. According to the initial Determination, denial was required because "[e]ven if we were to agree that the [vessels] at issue are engaged in interstate commerce, we do not agree that by assisting vessels that are carrying cargo, the

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refund. Reconsideration is limited to this taxpayer's refund request.

<sup>2</sup>See, WAC 458-20-100 (5) and (6).

<sup>3</sup>The amounts at issue are . . . from [July 1982] to [December 1983]; and . . . from [January 1984] through [December 1987].

<sup>4</sup>[Taxpayer's "Request for Executive Level Reconsideration on Denial of Petition for Refund"].

[vessels] are engaged in interstate commerce `by transporting property for hire.'"<sup>5</sup>

Further, we concluded that "Washington law . . . does not grant an exemption for vessels engaged in interstate commerce involving the transportation or (sic) property or persons for hire. Only vessels which actually transport property or persons for hire are exempt." <sup>6</sup>

Taxpayer argues that its [vessels] are conducting interstate commerce by transporting property therewith for hire, as required by the statutes. Taxpayer objects to the Determination's conclusion that the [vessels] must actually transport property. According to taxpayer, this conclusion is contrary to "the plain and ordinary meaning of the language used by the legislature."<sup>7</sup> Taxpayer claims that by ignoring the legislature's use of the term "or therewith" in the statutes, the Determination essentially renders the term meaningless and superfluous.<sup>8</sup> This result, according to taxpayer, is error as a matter of law because the Department failed to apply the basic rules of statutory construction by applying the clear and unambiguous language of the statutes.

Further, taxpayer states that the Determination's conclusion is inconsistent with the application of "or therewith" vis a vis the use tax exemption ( . . . ) as discussed and defined in a prior final determination. Taxpayer refers to a final determination in which the Department said the following:

"[in] respect to its use in the statute and rule . . . [therewith] . . . means together with and as part of towing property for hire."<sup>9</sup>

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<sup>5</sup>[Det. No. 91-323].

<sup>6</sup>Id. at p. 7.

<sup>7</sup>[Taxpayer's "Request for Executive Level Reconsideration of Denial of Petition for Refund"].

<sup>8</sup>Id., at p. 7.

<sup>9</sup>Det. No. 85-308A and 86-20A, 1 WTD 415, 436 (1986). In this final determination, the issue of whether a taxpayer was entitled to the use tax exemption on a vessel used in an "interstate sealift operation" was resolved in taxpayer's favor. The Department found that taxpayer's vessel was only used to tow or haul breakaway barges and other vessels, as well as cargo, moving in interstate commerce. The final determination is factually different in that there the vessel was actually operating in

Taxpayer also relies on that final determination in part as dispositive of its request because in that final determination the Department said that towing other watercraft which are carrying cargo in interstate or foreign commerce is entitled to the use tax exemption of RCW 82.12.0254 and WAC 458-20-175 (Rule 175).<sup>10</sup> However, taxpayer argues, that the statutory use of the term "property" not the term "cargo", requires broader application and does not limit the exemptions to watercraft which carry or tow only cargo.

Taxpayer claims that use of cargo narrows the statutory application whereas the statutes' use of "property" not cargo supports taxpayer's position that by transporting other exempt vessels the [vessels] are themselves transporting property for hire. Thus, taxpayer, argues that even if the [vessels] are required to actually transport property, . . . , its [vessels] meet that requirement.

In further support of its refund request, taxpayer stated that the [vessels] in question meet the use tax exemption requirement because they are "primarily used" in interstate commerce, i.e., more than 51% of their usage is in providing these services to other exempt watercraft which are hauling cargo in interstate commerce. In the event that taxpayer's request for refund is sustained, taxpayer has requested an audit for verification of such usage.

Finally, in its original petition for refund, taxpayer argued extensively that the exemptions from sales and use taxes do not require that the watercraft cross Washington boundaries in order to conduct interstate or foreign commerce. Although taxpayer does not again specifically raise the issue in its request for executive level reconsideration, the issue will be addressed in the discussion below in light of taxpayer's reliance on Det. No. 85-308A and 86-20A, 1 WTD 415 (1986) and the challenged ruling in Det. No. 91-323. These two prior determinations did not decide the question of whether boundary crossing for the watercraft is required as a basis for determining whether the vessels are conducting interstate commerce by transporting property or persons for hire.

Taxpayer and the Department agreed to limit oral presentation at the hearing held on July 29, 1992 to taxpayer's statutory

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interstate commerce and moving outside the Washington territorial boundaries.

<sup>10</sup>The sales tax exemption RCW 82.08.0262 was not in issue directly. However, Rule 175 which defines the application of the exemption, also uses the term "or therewith."

construction arguments on the meaning of "or therewith" as used in RCW 82.12.0254 and 82.08.0262.

#### ISSUES:

1. Is taxpayer conducting interstate or foreign commerce by transporting therewith property for hire if taxpayer is towing and/or escorting other watercraft carrying cargo in interstate or foreign commerce?
2. Is taxpayer exempt from use and sales taxes pursuant to statutory exemptions notwithstanding that taxpayer's [vessels] are engaged in . . . activities conducted exclusively within the territorial waters of Washington State?

#### DISCUSSION:

RCW 82.08.020 and 82.12.020 impose sales tax on retail sales and use tax on tangible personal property used by a consumer in Washington State. However, the legislature enacted exemptions of both sales and use taxes for watercraft primarily used in conducting interstate and foreign commerce by transporting persons or property; and for component parts installed, and labor and services rendered in maintaining and repairing such watercraft. We agree that the purpose for enacting the exemptions was to "facilitate and encourage the use of Washington based transportation providers in interstate commerce and ensure competitiveness for Washington carriers . . ." and for "increasing the competitive position of Washington businesses" with those of other states. Tax Exemptions 1986, p. 99.

The taxpayer provides [vessel] assistance to "watercraft" entering and leaving Washington harbors. The [vessels] in issue are those which provide ". . . assist" and ". . . escort" services to other watercraft which are exempt from sales and use taxes pursuant to RCW 82.12.0254 and 82.08.0262. The only analysis required, is whether taxpayer's [vessels] are used to conduct interstate commerce or foreign commerce "by transporting property therewith." A presumption is made that the [vessels] are providing a service for hire.

For the reasons stated below, we find that taxpayer's . . . assist [vessels] are "conducting interstate commerce by transporting . . . therewith property . . . for hire" only when the [vessels] physically attach or connect to other exempt cargo-laden watercraft for the sole purpose of towing or hauling such watercraft. We believe that by physically moving other exempt watercraft, taxpayer's [vessels] are used to conduct interstate commerce by actually transporting property therewith. We also

find that taxpayer's . . . escort [vessel] activities merely facilitate interstate commerce and do not come within the meaning of the statutory exemptions.

We agree that "no part of a statute should be deemed inoperative or superfluous unless it is the result of obvious mistake or error. This requires that every word, clause, and sentence of a statute be given effect, if possible." We also agree with taxpayer that "it is a well-established axiom of statutory construction that statutes should be construed, wherever possible, so that 'no clause, sentence or word shall be superfluous, void, or insignificant.'" United Parcel Service v. Department of Revenue, 102 Wn.2d 355, 361-362 (1984).

RCW 82.08.0262 states in pertinent part:

The tax levied by RCW 82.08.020 shall not apply to sales of . . . watercraft for use in conducting interstate or foreign commerce by transporting therein or therewith property and persons for hire . . .; also sales of tangible personal property which becomes a component part of such watercraft . . .; also sales of or charges made for labor and services rendered in respect to such constructing, repairing, cleaning, altering, or improving.

RCW 82.12.0254 provides for a use tax exemption as follows:

The provisions of this chapter shall not apply in respect to the use of any . . . watercraft used primarily in conducting interstate or foreign commerce by transporting therein or therewith property and persons for hire . . . and in respect to use of tangible personal property which becomes a component part of any such watercraft, . . .

WAC 458-20-175, the administrative rule implementing the exemptions, generally restates the above statutes and provides definitions of key words and phrases found therein. The definitions include the following:

The term "watercraft" includes every type of floating equipment which is designed for the purpose of carrying therein or therewith persons or cargo. It includes tow boats, . . .

The term "carrier property" means . . . watercraft, and component parts of the same.

The term "component part" includes all tangible personal property which is attached to and a part of carrier property. It also includes spare parts which

are designed for ultimate attachment to carrier property....

Rule 175 also provides the parameters for the retail sales and use tax exemptions:

By reason of specific exemptions contained in RCW 82.08.0261 and 82.08.0262 the retail sales tax does not apply upon the following sales:

(1) Sales . . . watercraft for use in conducting interstate or foreign commerce by transporting therein or therewith property and persons for hire;

(2) Sales of tangible personal property which becomes a component part of such carrier property in the course of constructing, repairing, cleaning, altering or improving the same;

(3) Sales of or charges made for labor or services rendered with respect to the constructing, repairing, cleaning, altering or improving of such carrier property . . .

The use tax does not apply upon the use of . . . watercraft, including component parts thereof, which are used primarily in conducting such businesses.

"Actual use within this state," as used in RCW 82.08.0261 does not include use of durable goods aboard carrier property while engaged in interstate or foreign commerce.

1. "Therewith": [vessels] must actually tow other cargo-laden exempt watercraft.

[1] We find that Det. No. 91-323 incorrectly concluded that the [vessels] are required to actually carry cargo/property in order to be "transporting therewith property." The statutes have no such requirement. Further, we have stated that the "common and ordinary meaning of "therewith" is simply "together with" or "as part of" and "its use in the statute and rule . . . means together with and as part of towing property for hire." We also said,

". . . that the statutory exemption requires a vessel to be used to either carry cargo or tow other watercraft which actually carry cargo. However, we find conclusively in this case that the vessel was used, and was intended only for use to tow cargo laden watercraft. For these reasons, . . . we must conclude



that the use tax exemption of RCW 82.12.0254 and Rule 175 is fully available in this case."<sup>11</sup>

(Emphasis added.)

Thus, the other vessels must be towed by taxpayer's [vessels], if the [vessel] itself is not carrying the cargo. Webster's II, New Riverside University Dictionary defines "tow" as: "to draw or pull along behind by a chain or line." This definition of "tow" comports with taxpayer's description of the [vessels'] . . . assist activities. Taxpayer described those activities as follows:

(1) . . . [A]ll of the [vessels] provide towing and similar services to other interstate exempt watercraft which are laden with cargo. The [vessels] do not simply "nudge" the cargo vessels into or out of their berths. Rather, the [vessels] go out to meet the vessel at a point that is one mile on the average from the vessel's berth . . . The [vessels] are then 'made fast'. . . and physically connected to the vessel with lines and/or cables. The [vessels] then provide propulsion or steerage as directed by the ship's pilot, effectively becoming a part of the vessel until the vessel is made secure at the dock. The [taxpayer's vessels] and the vessel essentially become one unit, similar to a [vessel] towing a barge in interstate commerce. The above operation is basically reversed when the vessel is leaving port.

(Emphasis added.)

We find taxpayer's . . . assist activities as described above meet the statutory requirements of "transporting therewith." We agree that by physically connecting or attaching to the exempt cargo-laden vessel, that taxpayer is transporting property "together with" the exempt watercraft thus continuing the movement of the property in interstate or foreign commerce by becoming as "one" with the cargo-laden exempt vessel. It is the physical connection to other exempt watercraft that triggers the exemption for taxpayer's [vessels]. Clearly, if the [vessel] is towing a vessel which is itself not exempt under these statutes neither the vessel nor the [taxpayer's vessel] is exempt.

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<sup>11</sup>In this case, the Department found that the vessel was actually used to tow barges and other vessels transporting cargo during journeys from Washington to Alaska. Det. No. 85-308A and 86-20A, 1 WTD 415 (1986).

2. There is no boundary crossing requirement stated in the watercraft exemptions.

[2] Although the initial Determination did not decide whether boundary crossing is required under the exemptions for watercraft, we agree that the legislature did not include any such requirement in the language of the statute. United Parcel Service v. Department of Revenue, *supra*. Of course, the legislature may choose at anytime to modify the exemptions to include boundary crossing requirements for watercraft.<sup>12</sup>

3. The [vessels] must be used as an inseparable part of a continuing interstate movement of property for hire.

[3] We find that by physically towing or hauling other exempt cargo-laden watercraft, the [vessels] are continuing the movement of property in interstate or foreign commerce and that under these circumstances taxpayer's . . . assist [vessels] are conducting interstate commerce notwithstanding that they never cross Washington's water boundaries. We find that these [vessels], moving exclusively within the territorial waters of Washington State, are actually transporting therewith exempt property and are thus an inseparable part of the movement of interstate commerce. In Det. No. 88-37, 5 WTD 107, 112 (1988) quoting 85-308A and 86-20A, 1 WTD 415, 436 (1986) we said:

To qualify for the statutory exemption, a boat must be used as an inseparable part of a continuing interstate movement of property for hire.

4. Use of the term cargo instead of property does not violate rules of statutory construction.

[4] We reject taxpayer's argument that the vessels themselves are property within the meaning of the statute and that the Department erred by equating the statutorily used term "property" with the more narrow term "cargo." We do not agree. Rule 175 defines watercraft as that which is designed to carry cargo, "including tow boats . . . ." Cargo is a term used to describe

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<sup>12</sup>In United Parcel Service v. Department of Revenue, 102 Wn.2d 355, 687 P.2d 186 (1984), the Court, in dicta, agreed with the Department's own argument that ". . . [t]he presence of boundary-crossing language in the motor vehicle carrier exemption, taken together with the absence of such language in the exemption for other types of carriers, would thus support the State's interpretation of RCW 82.12.0254."

the property the watercraft is transporting. Final determination, 85-308A and 86-20A, states that the vessel must be hauling or towing other vessels carrying cargo. The statutory exemptions require that the watercraft be used to conduct interstate or foreign commerce by transporting property therein or therewith. Taxpayer's [vessels] would not be entitled to the exemptions if the vessel it is towing is not itself transporting property.

Taxpayer states that this is a narrow application of the term property as used in the exemption. However, the exemption must be narrowly construed.<sup>13</sup> We find that cargo is not improperly used to define the scope of the exemptions. It is consistent with Rule 175 and prior determinations cited herein. The watercraft exemption runs to the vessels providing the means by which the property i.e., cargo, is transported. We do not find that by transporting an empty vessel, that taxpayer's [vessels] can be found to be conducting "interstate or foreign commerce by transporting property or persons therein or therewith for hire." Rule 175.

5. [Vessels] providing escort services without physical connection to other exempt watercraft are not "transporting therewith" property for hire.

Likewise, we reject taxpayer's argument that . . . escort activities result in "transporting" property for hire. Taxpayer describes the activities . . . as providing ...

escort services to watercraft . . . in interstate commerce. The [vessels] meet. . . and accompany the [vessel] to its destination . . . . The [vessels] are not physically connected . . . , unless an emergency, occurs, which requires the [vessels] to attach a line .  
 . . .

[Taxpayer's vessels] provide [this] escort service for vessels . . . . The first instance of connection is at the dock. This is a standard procedure of providing intrastate [vessel] services and is an activity akin to stevedoring, i.e., facilitating the flow of interstate commerce.<sup>14</sup> The exemptions are not based on

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<sup>13</sup>Id., at 360

<sup>14</sup> Washington Rev. Dept. v. Stevedoring Assn., 435 U.S. 734, 98 S.Ct. 1388, 55 L.Ed.2d 682 (1978).

whether the taxpayer is conducting interstate commerce but whether it is doing so by "transporting" property therewith.

We have said that "therewith" qualifies the . . . assist [vessels] because they physically connect to the other exempt vessels, virtually making the two vessels one. These [vessels] then move property "together with" the cargo-laden exempt vessel. This, we said, is transporting property therewith.

[5] Escorting other vessels is not the same as "transporting property therewith." Where taxpayer's [vessels] merely "stand by" and wait to provide assistance, if needed, cannot be held to be "transporting therewith." Likewise, merely guiding, escorting, physically pushing or "nudging" other exempt watercraft is not "transporting property therewith."

In the final determination on which taxpayer relies in part (Det No. 85-308A and 86-20A), we held that [vessels] were exempt provided they were towing or hauling other cargo-laden vessels moving in interstate commerce. Opinion was reserved as to whether merely "standing by" would constitute transporting. We now find it is not.

We therefore sustain that portion of the initial Determination (Det. No. 91-323) that found [escort vessels] and other similar watercraft, including taxpayer's two [vessels], are not entitled to the retail sales and use tax exemptions under RCW §§ 82.08.0262, 82.08.0261 and 82.12.0254.

6. [Vessels] must be primarily used to conduct interstate commerce by transporting property or persons therein or therewith for hire.

[6] Finally, in order to qualify for the exemption taxpayer must also show that these [vessels] for which retail sales and use tax refunds are requested are used primarily for towing or hauling exempt vessels. We require that such primary use must constitute at least 51% of each [vessel's] usage. Obviously, those [vessels] which do not provide such primary use are not entitled to the exemption.

#### DECISION AND DISPOSITION:

Taxpayer's request for refund of sales and use taxes paid on [vessels] purchased or leased for use primarily in conducting interstate commerce by transporting therewith persons or property is granted. This matter is remanded to Audit for examination of taxpayer's records to determine the number of [vessels] actually and primarily used to provide . . . assist services by physically connecting or attaching to other exempt vessels. We have said

that primary use of the vessels must be at least 51% in order to be exempt.

Audit shall determine the amount to be refunded based on taxpayer's records. Taxpayer has requested that the department use its "hour test." We are confident that audit will be able to determine the most feasible and accurate means to measure the primary use of the [vessels] and is not bound by taxpayer's proposal.

Taxpayer's request for refund of sales and use taxes paid on two [vessels] purchased and used primarily in providing . . . escort services is denied. We find this activity is not "transporting property for hire," is a wholly intrastate activity taxable under RCW 82.08.020 and RCW 82.12.020, and does not qualify for the sales and/or use tax exemptions under RCW §§ 82.08.0262, 82.08.0261 or 82.12.0254.

DATED this 19th day of October 1992.