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

In the Matter of the Petition for Correction of Assessment of)	D E T E R M I N A T I O N
)	No. 87-267
. . .)	Registration No. . . .
)	Tax Assessment No. . . .
)	

[1] **RULE 180 AND RCW 82.16.010(9)**: PUBLIC UTILITY TAX -- URBAN TRANSPORTATION BUSINESS -- CONSTRUCTION OF STATUTES. Where statute defines urban transportation business as operation "between" cities and towns less than five miles apart or within five miles of "either" thereof, only two cities or towns are contemplated. Otherwise, the legislature would have specified "among" and "any."

[2] **RULE 111**: ADVANCES AND REIMBURSEMENTS -- PAYMASTER -- LOANED SERVANT -- EMPLOYER/EMPLOYEE. Taxpayer provided a driver to work for a second company driving trucks owned or leased by the second company. The taxpayer received payroll expenses plus a handling fee. Taxpayer was the nominal employer, but the second company exercised complete physical control over the driver and the driver worked exclusively for the second company. Held: the second company was the employer in fact, and the taxpayer was liable for business and occupation tax only upon the 15 percent handling fee.

TAXPAYER REPRESENTED BY: . . .
. . .
. . .

DATE OF HEARING: April 22, 1987

NATURE OF ACTION

Taxpayer petitions for correction of assessment in which:

(1) Income derived from transporting property of others was reclassified from the Urban Transportation public utility tax to the Motor Transportation public utility tax.

(2) Service and Other Activities business and occupation tax was assessed on gross amounts received from another business to whom the taxpayer supplied a truck driver.

FACTS

Rosenbloom, A.L.J. -- (1) The taxpayer operates an intrastate trucking service. About 95 percent of the taxpayer's business is less-than-truckload (LTL) using the "hub" method. That is, the taxpayer sends its truck to a number of places of business to pick up goods for shipment. The truck returns with the goods to the taxpayer's terminal (or "hub") in Seattle. There the goods are unloaded, sorted, and reloaded, usually upon a different truck, for shipment to their various destinations.

The taxpayer does not keep records showing the precise path followed by each shipment. This would be virtually impossible since its drivers do not follow a regular route. Their routes vary daily according to where pickups and deliveries are to be made. Most routes, however, begin and end in Seattle, passing through one or more intermediate cities such that the vehicle is at all times within five miles of the corporate limits of some city. This is due to the closely built up nature of Seattle and its surrounding communities, which the taxpayer refers to as the urban commercial zone.

The taxpayer reported amounts derived from operating within this urban commercial zone under the Urban Transportation classification of the public utility tax. The auditor selected a test period from which records of individual shipments were examined. The auditor asserted the Motor Transportation public utility tax on those shipments whose points or origin and destination did not comport within the definition of Urban Transportation Business.

(2) The taxpayer provides a driver to [ABC Company]. The driver was initially hired by the taxpayer but has been

driving solely for [ABC Company] for many years. The driver is a union member. [ABC Company] does not employ union drivers. They use the driver for delivering goods when required by contract to use union labor. The taxpayer pays the wages and other benefits of the driver, and reports itself as the employer of the driver to state and federal authorities. The taxpayer bills [ABC Company] for direct payroll expenses attributable to the driver plus a 15 percent handling fee. These changes are separately stated.

In spite of the foregoing, the taxpayer does not exercise any control over the driver in the course of his day-to-day activities. The driver reports to work at [ABC Company]'s place of business. He drives a truck owned or leased by [ABC Company] according to their directions. When not driving, he remains on call at [ABC Company]'s place of business.

The taxpayer reported the 15 percent handling fee under the Service and Other Activities business an occupation tax classification. The auditor asserted tax under the same classification upon the gross amounts received from [ABC Company].

TAXPAYER'S EXCEPTIONS

(1) The taxpayer asserts that the legislature intended to recognize the existence of urban commercial zones within which carriers might operate subject to the Urban Transportation classification of the public utility tax. The taxpayer asserts it would be unduly burdensome for it to document the origin and destination of individual shipments.

(2) The taxpayer asserts that only the 15 percent handling fee for providing the driver to [ABC Company] is subject to tax.

DISCUSSION

(1) The taxpayer's notion that the legislature intended to create an urban commercial zone comprised of Seattle and its surrounding communities is not supported by the statute. RCW 82.16.010(9) defines "urban transportation business" as follows:

> "Urban transportation business" means the business of operating any vehicle for public use in the conveyance of persons or property for hire, insofar as (a) operating entirely within the corporate

> limits of any city or town, or within five miles of the corporate limits thereof, or (b) operating entirely within and between cities and towns whose corporate limits are not more than five miles apart or within five miles of the corporate limits of either thereof . . . .
>
> (Emphasis supplied.)

[1] The use of the preposition "between" and the pronoun "either" suggests that only two cities or towns are involved. If the legislature had intended otherwise, they would have specified "operating entirely within and among cities and towns whose corporate limits are not more than five miles apart or within five miles of the corporate limits of any thereof." This construction is amply supported by WAC 458-20-180 which provides in part:

> . . . Thus an operation extending from a city to a point which is more than five miles beyond its corporate limits does not constitute urban transportation, even though the route be through intermediate cities which enables the vehicle, at all times to be within five miles of the corporate limits of some city.
>
> (Emphasis supplied.)

In other words, three or more neighboring cities may not be linked together to create an urban commercial zone for purposes of applying the Urban Transportation classification as the taxpayer suggests.

Further, we specifically approve the auditor's method of examining the origin and destination of selected shipments. Far from imposing a more onerous record keeping burden on the carrier, this method frees the carrier from having to trace the actual path taken by each shipment. The auditor's method presumes that the goods are transported directly from their origin to their destination. Thus, the carrier is not penalized merely because the carrier's operation in fact extends beyond the geographical limits of the urban transportation classification.

For example, if the taxpayer picks up a shipment in Tacoma for delivery in Puyallup, then the Urban Transportation classification applies because the corporate limits of those two cities are not more than five miles apart. If one considers that the shipment would have gone via Seattle, then one might conclude that the Motor Transportation

classification is the appropriate one since the corporate limits of Seattle are more than five miles from the corporate limits of either Tacoma or Puyallup. Obviously, carriers using the hub method benefit from the fact that the Department examines only the points of origin and destination, without regard to the route actually taken.

It may be that even examining only the points of origin and destination of individual shipments imposes a difficult burden on the taxpayer. Be that as it may, it is not the Department's discretion to relieve the taxpayer of this requirement. Any shipments which the taxpayer cannot properly document to fall within the Urban Transportation classification must be presumed to be taxable under the Motor Transportation category. See RCW 82.16.010(8).

The taxpayer's petition for correction is denied as to this issue.

(2) To determine whether the tax is due on gross amounts received from [ABC Company], it is necessary to decide who in fact is the employer of the employee in question. If the taxpayer is the employer, then the taxpayer is rendering services to [ABC Company] by providing a loaned servant for the conduct of [ABC Company]'s business. The gross amount received from [ABC Company] would be subject to Service and Other Activities B&O tax. Valley Cement Construction, Inc. v. Department of Revenue, Washington Board of Tax Appeals, Docket No. 71-70 (1973).

On the other hand, if [ABC Company] is the employer and the taxpayer's sole function is to act as a paymaster, then the taxpayer is merely a conduit for payment of [ABC Company]'s own payroll expenses and amounts received for that purpose are nontaxable reimbursements (see WAC 458-20-111). In this case, only the 15 percent handling fee would be subject to tax.

The taxpayer represents itself as the employer to certain state and federal agencies. This raises a presumption that the taxpayer is the employer (see Valley Cement Construction v. Department of Revenue, supra). This presumption is not conclusive, however. If [ABC Company] is the actual employer, then the taxpayer will not be treated as the employer merely because it reports itself to state and federal agencies as such.

A key consideration in determining who was the actual employer rests with an analysis of who controlled or had the right to

control the activities of the employee. The element of control includes the right to hire, fire, and supervise the physical performance of the employee.

The taxpayer hired the driver. If his performance was unsatisfactory, [ABC Company] could not remove him from the taxpayer's payroll. However, [ABC Company] could certainly remove him from the job and ask the taxpayer to provide a different driver. Thus, while [ABC Company] may not technically have the right to fire the driver, the driver continues to be employed at the pleasure of [ABC Company] in a practical sense.

The right to supervise the driver in the performance of his day-to-day activities rests exclusively with [ABC Company]. The taxpayer has no contact with the driver other than to pay him. Furthermore, the driver is dedicated exclusively to [ABC Company]. He works for no entity other than [ABC Company]. Because [ABC Company] exercises complete physical control over the driver and because the driver works for no one other than [ABC Company], we find that [ABC Company] is the employer in fact of this driver. Accordingly, only the 15 percent handling fee is subject to business and occupation tax.

The taxpayer's petition for correction is granted as to this issue.

DECISION AND DISPOSITION

The taxpayer's petition for correction is granted in part and denied in part. The Audit Section will issue an amended assessment consistent with this Determination.

DATED this 12th day of August 1987.