

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

In the Matter of the Petition ) D E T E R M I N A T I O N  
For Correction of Assessment )  
of ) No. 89-455  
 )  
 . . . ) Registration No. . . .  
 ) . . . /Audit No. . . .  
 )

[1] RULE 174 & RCW 82.12.0254: USE TAX -- VEHICLES USED SUBSTANTIALLY IN INTERSTATE COMMERCE -- 25% TEST REVENUE VS MILEAGE. For determining whether a vehicle has been used "in substantial part in the normal and ordinary course of the user's business for transporting therein persons or property for hire across the boundaries of the state" the Department requires that the vehicle be used in actually transporting property or persons for hire across state boundaries at least 25% of the time. Interstate usage by this business is best measured by the total percentage of miles traveled by each vehicle on such interstate line-crossing trips and not by the revenue generated by each vehicle's interstate line-crossing trips.

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: July 7, 1989

NATURE OF ACTION:

An ICC carrier protests use tax imposed on carrier equipment in an audit report.

FACTS AND ISSUES:

Okimoto, A.L.J. -- . . . (taxpayer) is an ICC carrier whose offices are located in . . . , Washington. The books and records of the taxpayer were examined for the period July 1, 1984 through June 30, 1988. As a result of the audit, an assessment was issued on January 31, 1989 for additional taxes and interest owing in the amount of \$ . . . . The taxpayer has paid the unprotested portion of the assessment, and petitions for a correction of the balance.

Taxpayer's business primarily consists of transporting persons for hire via busses. The taxpayer operates a few scheduled routes, but derives the majority of its income from charters (ie. sightseeing tours, private charters, and long distance tours).

The taxpayer engages in five distinct types of transportation activities:

1. Airporter service (Dedicated busses) (Intrastate) (Transporting passengers from downtown Seattle to the airport.)
2. Local vicinity sightseeing (Rotated busses) (Intrastate) (Transporting private charters to local tourist areas)
3. Scheduled service (Rotated busses) (Intra/Interstate) (Scheduled routes open to all persons)
4. Straight bus charters (Rotated busses) (Intra/Interstate) (Private charters by individuals to designated places)
5. Long distance tours (Rotated busses) (Interstate) (Private charters to out-of-state locations taking up to 10 days)

The busses used for the Airporter service were dedicated primarily to that activity. Since that activity is solely intrastate in nature, the taxpayer concedes that these busses are taxable, and has already paid the tax. Indeed, the taxpayer has already determined that many of its busses do not meet the "substantially used" test and has already paid the appropriate tax.

The busses in dispute are rotated between the different activities according to the season and the demand. As a result, one bus may be used for 10 to 14 local trips for every

one long-distance interstate trip. In addition the long-distance interstate trips have a higher occupancy percentage, cover more miles, and consequently produce more revenue.

The auditor determined that a use tax exemption applied to vehicles under RCW 82.12.0254 if but only if the following conditions had been met:

1. The user holds an ICC permit;
2. The vehicle is used
  - a. in substantial part
  - b. in the normal and ordinary course of the user's business
  - c. for transporting therein persons or property for hire across the boundaries of the state; and
3. The first use of the vehicle in Washington is actual use in conducting interstate or foreign commerce.

The auditor concedes that the first and third conditions of the statute have been met by the busses in question, but contends that the second condition of having been "substantially used in interstate commerce" has not. The auditor applied the Department standard of 25% in any given 12-month period as meeting the "substantially used" requirement. The auditor used the following formula (hereinafter referred to as "the mileage test") to determine whether the 25% threshold had been satisfied:

$$\text{Percentage} = \frac{\text{Total out-of-state mileage}}{\text{Total instate and out-of-state mileage}}$$

The taxpayer argues that the proper method for determining the 25% threshold should be based on the percentage of revenue earned by each bus on interstate trips vs revenue earned by both interstate and intrastate trips (hereinafter referred to as "the revenue test"). The taxpayer proposes that the following formula be used:

$$\text{Percentage} = \frac{\text{Gross receipts from interstate trips}}{\text{Total gross receipts from all trips}}$$

If this percentage is over 25%, the taxpayer argues that the bus should be considered "used in substantial part in the normal and ordinary course of the user's business for transporting therein persons or property for hire across the boundaries of this state" and consequently be exempt from tax.

In support of the revenue test, the taxpayer made the following points at the hearing:

1. Revenue more accurately reflects the interstate use of the busses in that unless the busses are used, no revenue is earned.
2. Revenue can't be manipulated whereas mileage can.
3. Mileage tests assume an equal occupancy of the busses whereas revenue automatically adjusts for unequal occupancy.

In the alternative, the taxpayer contends that the auditor misapplied the mileage test. The taxpayer states in its petition:

... For purposes of Schedule A, the Department in analyzing each interstate trip by a motorcoach treated all mileage within the State of Washington as intrastate and only the mileage outside the State as being interstate. In other words, if a motorcoach was travelling from Seattle to Vancouver, B.C., the Department considered the mileage from Seattle to the Canadian border as being intrastate and the mileage from the border to Vancouver, B.C. as being interstate.

The taxpayer contends that the Department lacks any justification for this bifurcation of what are clearly interstate trips. If the point of departure and the destination are in different states or countries, the entire trip is an interstate trip.

#### ISSUES:

1. Was the auditor correct when he rejected the revenue test desired by the taxpayer and utilized the mileage test to determine whether a bus was "substantially used in interstate commerce"?
2. If the mileage test is appropriate, did the auditor correctly classify only the out-of-state portion of mileage as being interstate for purposes of the test?

#### DISCUSSION:

[1] The Department and the courts have interpreted the use tax exemption granted in RCW 82.12.0254 to apply if but only if the following conditions have been met:

1. The user holds an ICC permit;
2. The vehicle is used
  - a. in substantial part
  - b. in the normal and ordinary course of the user's business
  - c. for transporting therein persons or property for hire across the boundaries of the state; and
3. The first use of the vehicle in Washington is actual use in conducting interstate or foreign commerce.

UPS v. Department of Rev., 102 Wn.2d. 355, (1984)

Because the auditor has conceded that the first and third criteria have been met, we will not discuss them at this time. Whether the taxpayer's vehicles have met the second condition of being "used in substantial part in the normal and ordinary course of the user's business for transporting therein persons or property for hire across the boundaries of the state" is the sole issue in dispute.

In the UPS case, the Washington State Supreme Court upheld the Department's interpretation that "substantial part in the normal and ordinary course of the user's business for transporting therein persons or property for hire" meant that in order for vehicles to be exempt, they were required to be involved in actually transporting goods for hire across state lines on 25% or more of the total trips made by any particular vehicle in any single calendar year. In sustaining the Department's "line crossing test" the Court stated:

Moreover, a line-crossing test as a measure of the substantiality of a vehicles's use to carry cargo across state lines is far more practicable. Application of a revenue or ton-mile test to each vehicle that crossed a state line would require an immense amount of detailed data as the contents of each particular vehicle. While UPS offered general statistics regarding its operations as a whole, the type of detailed information necessary for the use of a revenue or ton-mile test does not appear to have been available.

Thus, the court left open the question of whether other tests which individually account for either mileage or revenue

generated by each vehicle that actually crossed state lines would be allowable to determine the 25% standard. In fact the Court specifically recognized that historically, the Department has chosen among several methods to determine whether a vehicle is used "in substantial part" in interstate commerce under RCW 82.12.0254 and that the method used has depended entirely upon the "nature of the business involved."

In examining the taxpayer's business, we conclude that the auditor and the taxpayer correctly rejected the "line-crossing test". Because the taxpayer rotates its vehicles among the different types of transportation activities depending on the season and demand, each vehicle is involved in several types of transportation trips. Obviously, one short city tour (which may cover 20 miles and take a few hours) should not count the same as one long-distance tour to Canada (which may cover a thousand miles and take up to 10 days). Yet, under the line-crossing test, this would be the case, and we therefore conclude that it was correctly rejected.

In proposing the revenue test, the taxpayer maintains that a major benefit of the test is that it automatically adjusts for occupancy whereas the mileage test does not. In contrast to the taxpayer, we believe that this adjustment is the critical weakness in the revenue test. The usage of a vehicle in transporting persons across state lines should not be measured by the amount of revenue generated, but by the actual miles traveled. It makes no difference whether one vehicle transports a single person and another vehicle transports one hundred persons on their respective trips from Seattle to Boise. Both vehicles are engaged in the activity of transporting persons for hire across state boundaries regardless of the occupancy and each trip must be given the equal weight. Consequently, because of this inherent possibility of distortion in the revenue test, we must reject the taxpayer's proposal.

Although we find that the mileage test is the appropriate method of computing the applicable percentage of interstate usage, we nevertheless agree with the taxpayer that the auditor applied the test incorrectly. If a vehicle is transporting persons from Seattle to Vancouver, B.C., the entire trip should be considered as interstate mileage and not simply that portion outside the state of Washington. Accordingly, we will conditionally sustain the petitioner on this point.

Finally, we are not swayed by the taxpayer's final argument that the effort required to gather the information necessary to correctly apply the mileage test would be too time consuming to be economically feasible. We note that the taxpayer already has the total out-of-state mileage traveled by each vehicle. In addition, we assume that the taxpayer maintains records indicating the starting point and destination of each vehicle making an interstate trip. We fail to see the difficulty in computing the approximate mileage from the beginning point of the trip to the Washington border located between that starting point and its destination. Although this method would not be entirely accurate, we believe that for the purposes of this test it would be sufficient. Of course, if the taxpayer should desire to substantiate additional mileage, (either because of a detour or an indirect route to the border) more detailed records would be required.

We finally note that RCW 82.32.070 places the burden on the taxpayer to maintain "... suitable records as may be necessary to determine the amount of any tax for which he may be liable,..."

DECISION AND DISPOSITION:

The taxpayer's petition is conditionally granted and remanded to the audit section, subject to the taxpayer providing the required information to the auditor by November 30, 1989. In the event that the taxpayer fails to provide the information by the November 30, 1989 deadline, the assessment will become immediately due and Document No. . . . in the amount of \$ . . . , plus extension interest of \$ . . . , for a total sum of \$ . . . will be due for payment by November 30, 1989. After payment, however, the taxpayer may petition for a refund. DATED this 15th day of September 1989.