Cite as 85-308A and 86-20A, 1 WTD 415 (1986).

BEFORE THE DIRECTOR
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Joint Petitions For Corrections of Assessments of	F I N A L D E T E R M I N A T I O N
	Nos. 85-308A and 86-20A
. . .	Registration No. . . .
	Tax Assessment No. . . .
and	
. . .	Re: Watercraft Property Tax
	. . .
	. . .

[1] **RULE 105:** SERVICE B&O TAX -- EMPLOYEES PROVIDED FOR OTHERS. Salaries and related administrative costs attributable to employees provided to affiliated companies and allocated between such companies are properly included within the Service b&o tax measure.

[2] **RULE 194 AND RULE 155:** SERVICE B&O TAX -- COMPUTER SERVICES -- ALLOCATION OF COMPUTER SERVICES -- APPORTIONMENT. Amounts derived from allocating computer services between affiliated companies within and outside this state are apportionable based upon the locations where such services are performed, in order to determine Service b&o tax measure.

[3] **RULE 224, RCW 82.04.050 AND RCW 82.04.080:** SERVICE B&O TAX -- SALES OF "SAFE HARBOR" ASSETS. Sales of Federal tax credits and benefits provided under the Economic Recovery Tax Act of 1981 constitute "business" and "engaging in business" under statutory definitions and amounts so derived are properly included within the Service b&o tax measure, "gross income of the business."

[4] **RULE 224:** SERVICE B&O TAX -- "SAFE HARBOR" ASSETS -- APPORTIONMENT OF SALES -- SITUS. Amounts derived from

outright sales of tax credits and benefits provided by ERTA 1981 are not from any services rendered and are not apportionable between states. Such sales of intangible rights are fully taxable by the state where such rights have their situs.

[5] **RULE 175, RULE 178 AND RCW 82.12.0254:** USE TAX -- WATERCRAFT USED IN INTERSTATE COMMERCE. Vessels used to haul or tow other vessels laden with goods moving in interstate commerce are included within the scope of statutory use tax exemption.

[6] **RCW 82.12.0254:** STATUTORY CONSTRUCTION -- "THEREWITH." The term "therewith" as used in RCW 82.12.0254 has the common and ordinary meaning of "together with" or "as part of."

[7] **RULE 178 AND RCW 82.12.010(2):** USE TAX -- STORAGE PREPARATORY TO USE -- WATERCRAFT. The storage of property in this state, preparatory to actual use within this state, itself constitutes "use" under statutory definition, but only if the subsequent actual use is intrastate rather than tax exempt interstate use of watercraft.

[8] **PROPERTY TAX (WAC 458-12-255):** "HOME PORT" RULE -- VALIDITY. Until January 1, 1986 when Washington State adopted an apportionment rule for property tax on ocean-going watercraft, the "home port" rule applied and it was constitutionally valid.

[9] **PROPERTY TAX (WAC 458-12-255):** INSTRUMENTALITIES OF INTERSTATE COMMERCE -- TESTS OF TAX VALIDITY. The fourfold test for validity of tax under the Commerce Clause--1) nexus, 2) fair apportionment, 3) nondiscrimination and 4) relationship to state services provided--is satisfied when the vessel is located in this state on the tax lien date and regularly moored and maintained in this state, no other state asserts or has taxing jurisdiction, the tax is uniformly applied to all vessels, and the vessel has the advantage of port service here.

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: . . .
. . .

. . .

HEARING CONDUCTED BY DIRECTOR'S DESIGNEES:

Gary O'Neil, Assistant Director of Policy and Administration
Garry G. Fujita, Chief of Interpretation and Appeals
Edward L. Faker, Sr. Administrative Law Judge

DATE AND PLACE OF CONFERENCE: June 4, 1986; Olympia, Washington

NATURE OF ACTION:

Assessment No. . . .

Business and occupation (B & O) tax under the Service and Other Business Activities classification was assessed against the taxpayer, . . . Co., upon amounts derived from providing employees for use by affiliate companies, as well as upon amounts derived from the transfer of federal tax benefits and investment credits for a consideration.

Also, use tax was assessed upon a pro-rata portion of rental payments made by this taxpayer as lessee of the vessel . . . .

Assessment No. . . .

Watercraft property tax was assessed against the taxpayer, . . . Leasing Company, upon the value of the [vessel].

Determination No. 85-308 was issued on December 27, 1985 after an original hearing on Assessment No. . . . conducted in Seattle, Washington on August 8, 1986. It sustained the tax assessment, pending adjustments not in issue on this appeal.

Determination No. 86-20 was issued on January 15, 1986 without a hearing on Assessment No. . . . . It sustained the property tax on the [vessel], but ordered an apportionment for periods after January 1, 1986.

The taxpayers, with the approval of the Department of Revenue, have jointly appealed both tax assessments and Determinations, with the taxpayer . . . acting as the sole petitioner and referred to hereafter as the "taxpayer."

FACTS AND ISSUES:

Faker, Sr. A.L.J.--The audit and tax assessment details are fully and properly set forth in the respective Determinations and are not restated here. Also, the operative facts and background which generated the legal conclusion supporting the tax liabilities are set forth in those original Determinations. With the exception of the few conclusory factual disputes expressly noted later, the factual situations surrounding the transactions in question are not disputed.

There are four issues in controversy, three of which are with respect to Determination No. 85-308.

Issue No. 1

Do amounts allocated between the various affiliate companies of . . . Corporation as payroll, overhead, and administrative services, and carried on the business books of . . . Co., constitute taxable gross receipts to . . . Co.?

Issue No. 2

Are unapportioned amounts derived from transfers of federal tax benefits and credits pursuant to the Economic Recovery Tax Act of 1981 subject to business tax as "gross receipts" from "engaging in business" in this state?

Issue No. 3

Is a support vessel, moored in this state for significant periods of time, and subsequently used in connection with interstate, waterborne business activity, subject to apportioned use tax liability in this state, without exemption?

There is one issue in controversy with respect to Determination No. 86-20.

Issue No. 4

Does a support vessel used in connection with interstate, waterborne business, which has established business presence in this state, incur Watercraft property tax liability on either an apportioned or unapportioned basis?

The issues are presented here in the same order in which they were presented and argued at the June 4, 1986 Director's level hearing, which is different from the order in which they were presented in the taxpayer's petition or original Determination 85-308.

TAXPAYER'S EXCEPTIONS:

Issue No. 1

Regarding issue number one, the taxpayer asserts that the payroll, overhead, and administrative services costs allocated on its books and records between itself and various affiliates of . . . Corporation are not its own business costs recovered from the affiliates. With respect to the payroll allocation (the largest single cost allocation) the taxpayer asserts that the employees involved are not its own employees provided for use by the independent affiliates. Rather, these employees are permanent employees of the respective affiliate companies themselves. Those which were 100 percent dedicated to a respective affiliate company were ruled not to be the taxpayer's employees by Determination 85-308 and an adjustment was ordered to delete their payroll costs from the tax computation. However, the taxpayer asserts, the rest of the employees, whose payroll costs were also allocated and included within the tax base, were also direct employees of the affiliate companies. Some of them worked, alternately, for the taxpayer and various affiliates as needed. The taxpayer primarily relies upon the ruling of an earlier Determination No. 83-36 issued to its parent company, . . . Corporation (. . .), covering an audit period from January 1977 through December 1980. In that Determination the Department ruled that the respective employees (some 160 of them, which are the same employees whose payroll costs are in question here) were not employees of . . . , but were the employees of . . . 's affiliates, notably the taxpayer here. Thus, amounts received by . . . from the affiliates were ruled not to be taxable income to . . . from providing employees to work for the separate affiliate entities. The taxpayer now asserts that Determination 85-308 ignores this prior ruling and treats all of the non-dedicated employees as being employees of the taxpayer itself, whose payroll costs recovered from the other affiliates are taxable income to the taxpayer. Moreover, the taxpayer asserts that it did not recover these costs and there was no consideration or compensation paid to the taxpayer by reason of its supplying any employees for use by other affiliates.

The taxpayer's petition to the Director includes the following analysis of the facts and legal questions on this issue.

> Certain payroll, overhead and service costs related to the Taxpayer and the various affiliates in the Division have been traditionally accounted for on the Taxpayer's books of record prior to an annual re-allocation of the costs to the other Division affiliates. An appropriate allocation is also made to the Taxpayer.
>
> The major components of this allocation during the audit period are as follows:

	% of	Tax

	Allocation	Assessment
Salaries and Fringes	56%	$ 199,205
Corporate Computer Allocation	14	49,834
Donations, Advertising and Other	7	25,624
Office Rental	6	22,612
Travel-Administrative Employees	4	14,883
Other Equipment, Rent, Supplies, Telephones, etc.	13	45,521
TOTAL	100	$ 357,679

> The Salaries and Fringe category includes the cost of employees performing various services for the companies Division, including the Taxpayer. Such services include EDP support, Accounting services, coordination of vessel movements and scheduling, Executive management, Purchasing, Marketing and Sales, and Vessel Maintenance Supervision. This category represents the salaries and wages of approximately 160 Division employees.
>
> The Corporate Computer Allocation represents a pass through expense from the parent company, . . . , to the Division affiliates for computer services rendered directly to the affiliates. These computer services are performed entirely outside of Washington.
>
> The Donations, Advertising and Other category includes charitable contributions made by the affiliates of the Division as well as trade advertising expenditures for the various companies.
>
> The Office Rental category includes office space expenditures for the above described employees. The Travel and the Other categories represent additional overhead items related to these employees' activities.
>
> As a matter of convenience and accounting efficiency, all costs described above are originally charged to the Taxpayer's books of record. This accumulation of costs serves as a mere center or point for their record entry prior to an allocation of the costs to all Division companies. There are no contracts between Taxpayer and the other affiliates in the Division for this activity. No consideration, including money, is received by Taxpayer from its affiliates for this effort.

The taxpayer's petition then cites case law authorities supporting the legal separateness of individual persons or business entities, as well as case law relied upon in Determination 85-308 from which the taxpayer feels its case is distinguishable. The taxpayer's extensive arguments all go to simply support its position that the employees whose payroll costs are allocated between affiliates are not its own employees and that the related overhead and administrative costs are not its own costs being compensated for by others.

Specifically with respect to the "corporate computer allocation," the taxpayer's petition states:

> In the case of the computer allocation, the services are performed outside of Washington and passed through to the division companies. This is clearly exempt from taxation in this state. It was not contested in Determination 85-308 that the parent, . . . Corporation, provided computer services in San Francisco to the Taxpayer and its affiliates. . . . then made a gross charge for these services. The Taxpayer merely allocated these costs to it and its affiliates. It is undisputed that the Taxpayer did not provide the computer services.
>
> The decision held that if it were shown that . . . had separately identified charges for computer services rendered directly to each affiliate and then if [its subsidiary] had allocated these exact amounts to the respective affiliates then these costs would not be considered taxable income. But, because . . . made a gross charge to its Division and the Taxpayer allocated the expense to the affiliates on a cost basis other than that deemed required by the Determination the charges allocated by the Taxpayer become taxable to it. This also is a distinction without a reasonable or substantive basis. . . . , not [its sub], did the computer services in San Francisco. Contrary to the conclusion in the Determination these computer services are being taxed by this assessment. . . . did the work and it sent the costs to the affiliates in this Division. All the Taxpayer did was to allocate these costs for computer services to the various affiliates by using a convenient and efficient accounting technique. [Sub] provided no services to its affiliates. By entering the costs on its books it simply was acting as a conduit for its parent corporation. Taxpayer received no value or consideration from its affiliates for this cost entry.

The taxpayer's petition concludes:

> There is no evidence that the employees are the Taxpayer's any more than any other affiliated company for whom they provide services.
>
> Any overhead associated with the employees is also directly attributable to the company or companies benefited and as such is not income to the Taxpayer. The computer allocation is for services performed outside this state.
>
> We therefore ask for a correction in the amount of $357,679.00 of B&O tax.

At the June 4, 1986 Director's level conference the taxpayer stressed that its internal, cost control accounting for all employees was merely form over substance and should not be viewed as substantive evidence that these employees were its own. The taxpayer emphasized that there were no contracts with the affiliates for any employee services to be rendered and there was no consideration charged by the taxpayer or paid to it for any such services.

Regarding the computer allocations to the taxpayer again asserted that its book entries merely represent internal cost accounting for these services which were rendered entirely outside this state. The computer data base for . . . is in California, from where all of these services emanated.

<u>Issue No. 2</u>

As to the second issue the taxpayer argues that amounts derived from so-called "safe harbor leases," for transferring unusable federal tax benefits and credits to others, at arm's length, do not constitute "gross income" or "engaging in business" for purposes of the B&O tax.

Even if the amounts derived could be classified as part of gross receipts from business activities, arguendo, the taxpayer feels the exemption of RCW 82.04.4281 should apply.

Also, and again argued in the alternative, any tax upon the safe harbor lease income must be fairly apportioned between this state and the other state(s) where safe harbor leases and the transfers of credits were negotiated and arranged. The taxpayer maintains contributing offices and employees in these other states.

The taxpayer's petition contains the following points on this issue:

In accordance with ERTA, . . . Company (. . .), through its employees located at the . . . Corporation (. . .) offices in San Francisco, transferred tax benefits to selected items of personal property. Under the arrangement, [sub] retained both possession of and title to the assets. . . . showed, as an accounting allocation, a transfer for intercompany purposes of part of the tax deduction and credit so shared with one or more other U.S. taxpayers. (ERTA permitted no more than 90% of the deductions and credit to be shifted to another taxpayers.)

. . .

Using depreciation and investment tax credits, whether in whole or in part, is not a "business" as defined in RCW 82.04.140. This conclusion is illustrated as follows: If [sub] had borrowed money from a bank, instead of from a non-banking company as ERTA permits, and took that money and invested it in tangible personal property, and from that tangible personal property generated tax deductions and investment tax credits but had no income otherwise subject to B&O tax, the loan proceeds as well as that economic gain resulting from the depreciation and investment tax credits are not considered a business within the terms of RCW 82.04.140. Determination 85-308 concedes the illustration is correct.
Thus, with no business, there can be no "value proceeding or accruing from the business". And B&O tax cannot correctly apply.

Receipts from the sharing of federal tax deductions and federal investment tax credits are not "gross income of the business". RCW 82.04.080, although broad, is not co-extensive with all economic gain. "Value proceeding or accruing" includes specifically enumerated items of gain followed by a general "catchall, and other emoluments however designated." Sharing-i.e., splitting-of the federal tax deductions and credits is not one of the specifically enumerated items comprising "value".

As is clear from <u>Rainier Bancorporation v. Department of Revenue, supra</u>, under the ejusdem generis principle, the general term "other emoluments" must be accorded the same meaning and effect only to the extent that the general term suggests items or things "similar to those designated by the precise or specific terms". It is clear in looking at the specific terms that those specific terms deal with activities resulting in receipts derived from gainful employment rather than receipts derived from a participation in federal tax deductions and credits. The reason for this is clear: One may not be in the business of selling tax deductions or tax credits because the deductions and credits are personal to the taxpayer. The Determination failed to recognize this vital point when it held that the sale of federal tax benefits constitutes business (page 4).

Determination 85-308 at page 5 has misunderstood Queets Band of Indians v. State, 102 Wn.2d 1, 4 (1984) when it cites Queets as holding that the legal principle of ejusdem generis is irrelevant. Neither Rainier Bancorporation v. Department of Revenue nor ejusdem generis even was mentioned, let alone rejected or reversed in Queets. Rainier Bancorporation is a recent case, decided in 1982, and clearly cited the principle of ejusdem generis with approval by holding, as noted above, that when general words follow enumeration of particular or specific terms the general words will be construed as applying only to things of the same general class of those enumerated. The dicta in Queets relied upon in the Determination simply states that the word "'includes' is construed as a term of enlargement", 102 Wn2d at 4. The Queets court did not say that the word "includes" means unlimited enlargement as the Determination suggests. Contrary to the Determination, ejusdem generis is still recognized in Washington as a valid statutory construction principle. It is certainly applicable to the Taxpayer in this matter.

As mentioned above, RCW 82.04.080 is not co-extensive with all economic gain. For example, the use of the word emolument is itself a limiting factor because the word emolument means the profit arising from office or employment usually in the form of compensation or perquisites. Emolument also means, in an archaic sense, an advantage, and has as its synonym the word wage. The profit arising from office or employment is different in degree and quality from sharing by two taxpayers of federal tax deductions and credits.

It is beyond argument that had [sub] used 100% of the federal tax deduction and federal investment tax credit itself, there would clearly be economic gain resulting to [sub]. Nevertheless, that economic gain is not within the definition of gross income of the business

> under RCW 82.04.080. Thus, if for federal law purposes, [sub] is able to shift up to 90% of that tax deduction to another taxpayer, there is an economic loss of 90% of the deduction and credit. Nevertheless, the character and quality of the retained gain has not been changed. If 100% of the economic gain would be free of B&O tax, then logically something less than 100% of that gain should also be free of B&O tax. After all, the U.S. Government is still the payor/creator of that economic gain.

Concerning its alternative argument that statutory law provides an express tax exemption for this kind of income, the taxpayer's petition states:

> Even if sharing of tax benefits for federal purposes constitutes gross income for B&O tax purposes, this gross income is deductible under RCW 82.04.4281, notwithstanding the Determination's holding at page 5. That statute permits a deduction from the B&O tax base for all persons who are not financial businesses for amounts derived "from investments or the use of money as such". Certainly, the purchase of tangible personal property as capital assets for the generation of business earnings is an investment. The federal tax benefits of depreciation and investment tax credits are amounts derived from those investments for the use of money as such. The reason for this is that these deductions and credits are derived and generated solely from the investment in the property without having to do anything more to or with that property. As such, it is precisely the same as the purchase of a bond or the purchase of money market shares with otherwise idle working capital.
>
> In view of the foregoing, it is clear that the economic gain derived from the sharing of federal tax deductions and credits, which are a very small amount compared to the gross receipts of [sub], either are excludible from the B&O tax base or are deductible as amounts derived from investments and thus no B&O tax is applicable.

Concerning its second alternative argument, seeking apportionment of any "safe harbor lease" income taxed, the petition includes the following:

> Even if the sharing of investment tax credits is considered a taxable activity, an allocation on some basis would be justified.

> [Sub] maintains offices outside of Washington. The auditors and Administrative Law Judge, however, failed to permit the allocation of the ERTA gains, both in Washington and outside of Washington, and are requiring [sub] to pay B&O tax on non-Washington gains.
>
> It is also a fact that the work that went into negotiating and arranging the sharing of the investment tax credits was performed outside the state. The dollars received from the sharing appears on the Taxpayer's books of record mainly because the Taxpayer is the legal owner of the assets.
>
> An analysis of the underlying assets, which supports the investment tax credits, shows that most of the assets were outside the state at the time of the transaction closing. Further, most of the assets continue to be used outside this state or in interstate commerce.
>
> In view of these facts, we see no basis for a 100% allocation to Washington in the event that the sharing of the tax credits is considered a taxable activity.
>
> [Sub] also disagrees with the Determination where it holds that apportionment of the B&O tax found in RCW 82.04.460 does not apply to all taxpayers engaging in business activities taxable under RCW 82.04.290, but only to those taxpayers engaged in business activities involving rendering services taxable under RCW 82.04.0290. RCW 82.04.290 by its own language is very broad when it uses the words "this section includes, among others, and without limiting the scope hereof. . ., persons engaged in the business of rendering any type of service which does not constitute a "sale at retail" or a "sale at wholesale". It is taxpayer's contention that the apportionment requirement of RCW 82.04.460 in referring to RCW 82.04.290 and its very broad language included [sub] and all taxpayers except those persons involved in retail and wholesale sales who are specifically excluded in the statute.

The taxpayer's petition is extensively excerpted herein because, at the Director's level hearing, it was content to simply refer to its written petition in these respects.

Issue No. 3

The taxpayer's position on this issue raises questions of both fact and law. Though the facts are not in material dispute, the factual conclusions of Determination 85-308 are challenged. The essential question is whether the [vessel] was used by the taxpayer as a consumer in this state in any way which was not expressly exempt of use tax. The taxpayer asserts that it was not. Determination 85-308 concludes that it was. The taxpayer's petition, again relied upon at the hearing, contains the following:

> It is undisputed that the . . . is a 213 foot vessel designed and previously used as a trailer ship. It was acquired and modified by the taxpayer for use in its annual . . . operation to accompany tugs and barges transporting cargo and supplies from the contiguous United States to the North Slope of Alaska. This operation is conducted pursuant to contracts with major oil companies. It occurs during the warm months when weather and sea conditions permit passage to Prudhoe Bay. It is also undisputed that the vessel is used primarily outside of Washington. When it is not in use it is moored in Seattle. Page 1 of Determination and Auditor's Report Schedule XXIII.
>
> As Determination No. 85-308 at page 2 found, the . . . operation is unusually hazardous because of the severe conditions and the size of the cargo. The [vessel] is used in the operation in order to reduce this risk. The terms of taxpayer's contract with the oil companies require that the [vessel] accompany the other watercraft to and from the North Slope during the annual . . . operation because it has the ability to recover grounded or runaway cargo and equipment, including tugs and barges. The [vessel] has demonstrated this ability on previous [trips] by recovering and towing such cargo and equipment. Contrary to the finding, the [vessel] <u>does</u> tow barges and other vessels with cargo. In short, it is an inseparable part of the actual interstate transportation of goods for hire.

The petition cites statutory law as authority for its position.

> "Use" is defined in RCW 82.12.010(2) as "the first act within this State by which the Taxpayer takes or assumes dominion or control over the article of tangible personal property (as a consumer), and includes installation, storage, withdrawal from storage, or any other act <u>preparatory to subsequent actual use</u> or consumption <u>within</u> this state." (Emphasis added.)

An exemption to the Use Tax is contained in RCW 82.12.0254: "The provisions of this Chapter shall not apply in respect to the use of any airplane, locomotive, railroad car, or watercraft used primarily in conducting interstate or foreign commerce by transporting therein or therewith property and persons for hire. . . ."

The term watercraft is defined in WAC 458-20-175 as including "every type of floating equipment which is designed for the purpose of carrying therein or therewith persons or cargo. It includes tow boats, but it does not include floating dry docks, dredges or pile drivers, or any other similar equipment."

. . .

The findings in Determination 85-308 do not dispute the facts that the [vessel] meets the definition of watercraft contained in Rule 175 and that it is used primarily outside of Washington in interstate movements from this state to Alaska and back as a required, necessary and integral part of the . . . operation. Further, it is agreed that the vessel, when not in use in Alaska and other states, is not used here for any purpose. Rather, it is only moored in Seattle. Yet, the Determination rejected Taxpayer's position that it is not subject to the Use Tax because it does not use the vessel in this state. The Determination also wrongly rejected Taxpayer's argument that even if use in Washington were established, the Taxpayer is entitled to the exemption from the Use Tax as contained in RCW 82.12.0254. The reasons for the denial of taxpayer's petition were that the Determination improperly construed the definition of "use" as contained in the statute in light of the facts of this case and further that it imposed an overly strict construction on the statutory exemption. The Determination is without a reasonable basis in fact or law.

The decision concluded that the operation of the [vessel] in Washington waters as part of the . . . operation constituted a non-exempt actual use and that storage preparatory to such actual use was taxable pursuant to RCW 82.12.010(2). The conclusion misinterprets the statute cited above. The moorage of a vessel in Washington which is not preparatory to actual use of the vessel in this state is not subject to Use Tax as defined in RCW 82.12.010. The main purpose for the taxpayer's acquisition of the [vessel] was for the use of the vessel in the annual . . . operation. During the assessment period it also has been used in California and Oregon. The vessel has never rendered services in the State of Washington with the exception of raising the historic ship . . . which sunk in Lake Washington in February 1982. The salvage operation was provided free of charge as an act of community service. The moorage of the vessel in Washington, preparatory to the use of the vessel in the . . . operation, does not constitute use in this state. Without prejudice to this position Taxpayer will address the remainder of the determination concerning the Use Tax.

Even if use in Washington of the [vessel] properly could be found, the Taxpayer would be entitled to the interstate commerce exemption for watercraft. The Determination concluded that because the statute contains the wording "watercraft used primarily in conducting interstate or foreign commerce by transporting therein or therewith property and persons for hire" a watercraft must either carry cargo itself ("therein") or tow other watercraft which actually carry cargo ("therewith"). According to the Determination, merely accompanying other watercraft during the entire [operation] does not qualify for the exemption because of the requirements that the vessel itself actually carry cargo or tow other watercraft which carry cargo.

The Determination erred in its factual findings. It has been shown that the [vessel] has towed other watercraft carrying cargo for hire, including runaway and grounded tug and barges during [operation]. It is in fact designed for the purpose of towing and retrieving cargo and other watercraft. On this basis alone, the taxpayer meets the definitional requirements established by the Determination to qualify for the exemption.

Second, as a matter of law the Determination erred. Taxpayer agrees with the general rule of construction contained at page four of the Determination that "the words of a statute should be read to give effect to all of the language used". But another general rule of construction holds that "language in a statute must be given its ordinary meaning if not defined otherwise in the statute". Pacific First Federal Savings and Loan Association v. Washington, 92 Wn.2d 402 (1979). The

> word "therewith" is not defined in the statute, thus it must be given its ordinary meaning. No dictionary defines "therewith" as being limited to the act of towing. Towing is not even mentioned in any of the definitions of the word.

The petition the includes numerous dictionary definitions of the word, "therewith." It continues:

> Thus the word "therewith" has more than one meaning. It can refer to time and/or place. It includes accompanying something or following something either at the same time and/or place or immediately afterward without delay.
>
> At page three of Determination 85-308 the Administrative Law Judge conceded that if the perceived requirement of towing or carrying cargo did not exist mere accompaniment of the watercraft would qualify the exemption:
>
> > "If the exemption referred to watercraft "transporting property and persons for hire," then arguably the [vessel] might qualify even though it does not actually transport cargo, but merely accompanies other watercraft actually transporting cargo to assure their safety and success."
>
> Even if the taxpayer had not demonstrated that the [vessel] tows cargo and vessels, it would still qualify for the exemption in light of the quote immediately above because the definitions of "therewith" do not require actual linkage by towing or otherwise but requires only accompaniment in time and/or place. No reasonable person would dispute that the [vessel], as an essential part of the [operation], travels with the cargo at the same time and place. That is all that the law requires.
>
> Further, taxpayer agrees that the general rule is tax exemptions are strictly construed. However, another equally valid rule is that "if there is any doubt as to the meaning of a taxing statute, it must be construed most strictly against the taxing power in favor of the citizen." Buffelen Lmbr. and Mfg. Company v. State, 32 W.2d 40, 43 (1948).

The taxpayer stressed at the hearing that there was no use of the vessel in Washington as contemplated under RCW 82.12.010, but that the only use of the vessel was a strictly interstate use, exempt of use tax as explained in WAC 458-20-175 (Rule 175). In the latter respect the taxpayer likened the vessel, . . . to the caboose of a train. While it does not actually carry persons or property for hire, it is an integral part of the train, which does. Moreover, the statutory exemption which is implemented by Rule 175 also exempts "durable goods" of vessels doing business primarily in interstate commerce. The taxpayer stresses that durable goods are not specifically used to carry persons or property, "therein or therewith."

Issue No. 4

On appeal of Determination No. 86-20, which sustained the property tax assessment upon the [vessel], the taxpayer reiterated the arguments stated under issue no. 3 above. The same facts control. At the hearing the taxpayer explained that the vessel is located at times and used in states other than Washington. It is sometimes moored in this state, only in connection with the interstate . . . operation to Alaska. It is sometimes used for intrastate purposes in other states, but never in Washington State. The owner of the vessel is . . . Leasing Company, located in Illinois. The taxpayer asserts that under WAC 458-12-255 (Rule 255), effective for periods prior to January 1, 1986, the situs for taxation of this vessel was recognized as being its "home port," which was Illinois. The taxpayer specifically designees with the conclusory finding in the Determination that the vessel was, "more or less permanently, rather than temporarily, located in Washington." The taxpayer knows of no other state where the vessel has been subjected to property tax but surmises that it may have been in Alaska.

The taxpayer referred to its written petition for further argument and authorities. The petition recounts the location of the vessel throughout the period from 1980 through 1985. It concludes that the vessel has been absent from this state from two and one-half months to six and one-half months per year, either in other states or on the . . . operation. The petition then extensively examines the "home port" doctrine and seeks at length to distinguish the taxpayer's case from those referenced as authority in Rule 255 for making exceptions to the home port doctrine and determining vessels to have taxable situs other than at the residence of their owners. (See Determination 86-20, page 2). The petition recites that the general rule for taxation is still the home port rule and that the exceptions treated in the cases used as authority in Rule 255 are factually distinguishable. The petition states,

> The Supreme Court in Guinness, 35 Wn.2d at 506 favorably described the Home Port Doctrine as being a

> general rule that a ship or vessel can be taxed only at her legal situs - her home port and the domicile of her owner - and is not taxable by a state other than that in which her owner resides. It then stated the exception to the doctrine: "however, when a vessel is kept and used <u>wholly within the limits</u> of a state other than that in which the owner resides, she acquires a situs in such state for the purpose of taxation, ..." [emphasis added].
>
> The domicile of [owner] is Illinois. The presumption is that the situs of the [vessel] also is in Illinois. Under <u>Guiness</u> the only way that situs for purposes of taxation can be found to be in Washington is for the vessel to be kept and used wholly within the limits of this state. Obviously the facts clearly show that the Arctic Salvor, unlike the tugs in <u>North Western Lumber</u> and the yacht in <u>Guiness</u>, was and is not kept and used wholly within Washington. It certainly has not been abandoned. Thus, situs of the <u>Artic Salvor</u> remains at its owner's domicile. The provisions of WAC 458-12-255 and case law prohibit the State of Washington from taxing the vessel because of its non-Washington domicile and situs.

The taxpayer also asserts, alternatively, that an unapportioned property tax upon a vessel used in interstate commerce is in violation of the Commerce Clause of the U.S. Constitution. The petition states,

> WAC 458-12-255 as admitted in Determination 86-20 at page 3 did not provide for apportionment of taxation of watercraft used in interstate commerce. Instead it taxed all or nothing. Although Rule 255 has been replaced effective January 1, 1986 by WAC 458-17-100, which requires apportionment, WAC 458-17-100 according to Determination 86-20 is not retroactive. Thus the issue is whether Rule 255 is constitutional.
>
> Determination 86-20 held that <u>Complete Auto Transit</u> "is not relevant [because] that case involved a tax on 'the privilege of . . . doing business,' whereas the tax presently under consideration is an <u>ad valorem property tax</u>." [emphasis added]. Determination 86-20 is in error. In no manner is the test of <u>Complete Auto Transit</u> limited to state taxes on the <u>privilege of doing business</u>. It clearly is applicable to ad valorem property taxes. The U.S. Supreme Court stated such in a later case, <u>Japan Line Ltd. v. County of Los Angeles</u>, 441 U.S. 434 (1979). The opening paragraph of the

> opinion in Japan Line Ltd. declares that the issue was "whether a state, a non-discriminatory ad valorem property tax on foreign-owned instrumentalities (cargo containers) of international commerce", 441 U.S. at 435-436. At 444-451 in Japan Line Ltd., the court at length addressed the four pronged analysis of Complete Auto Transit as being necessary to determine the constitutionality of the state law. The California tax passed scrutiny on all four parts of the test including apportionment, but nonetheless was declared unconstitutional because of foreign commerce considerations, which are not relevant to this appeal. Clearly, at least since Complete Auto Transit and Japan Line Ltd were decided, it has been this nation's law that tax apportionment by states of instruments used in interstate commerce, such as watercraft, is required. . . .
>
> . . .
>
> Taxpayer agrees that Alaska Freight Lines, Inc. properly stated the law as it existed in 1965. However, because of the much more recent case Japan Line Ltd., 441 U.S. at 442-444 and its discussion of apportionment and the Home Port Doctrine, the Determination's reliance on Alaska Freight Lines, Inc. and WAC 458-12-255 to support the position that apportionment is not required is very doubtful. The U.S. Supreme Court described the Home Port Doctrine in Japan Line Ltd. at 443 as follows:
>
> > "Given its origins, the doctrine could be said to be 'anachronistic'; given its underpinnings, it may indeed be said to have been 'abandoned.' [citation omitted] As a theoretical matter, then, to rehabilitate the 'home port doctrine' as a tool of Commerce Clause analysis would be somewhat odd."
>
> In light of Complete Auto Transit and Japan Lines Ltd. the failure of Rule 255, RCW 84.08.200 and related property tax sections of the code to provide for apportionment deems them to be unconstitutional.

The taxpayer next asserts that the provisions of WAC 458-17-100 which was effective January 1, 1986, and which does provide for apportionment as constitutionally required, cannot be given retroactive application. An attempt to do so would be for the Department of Revenue to exercise legislative authority to impose tax. Extensive case law is cited which limits such authority to the legislative body. The petition then states,

> Clearly it has been demonstrated by the above cited cases that the power to tax rests with the legislature and not the executive or judicial branches of government. Equally important, by both state and federal law, not only the power to tax but the method, mode and means of taxation are subject to constitutional standards. The failure by the Washington legislature to provide for apportionment of the tax on the vessel was a constitutional flaw rendering it void, <u>supra</u>. Furthermore, the recent enactment of Substitute House Bill No. 1827 providing for exemptions and apportionment of property taxes on ships and vessels declares that it does not become effective until 1987. Therefore, it cannot be a basis for any attempted retroactive application of apportioned tax in this proceeding in order to cure the constitutional defect in the law. Likewise, the Washington Supreme Court has announced a general rule of statutory construction which is followed by this state and others "that legislative enactments will not be construed retroactively or retrospectively unless the intent that they be so construed is clearly shown by the language of the act either expressly or as a matter necessary implication." <u>In Re Cascade Fixture Co.</u>, 8 Wn.2d 263, 271 (1941).
>
> Although the Director of Revenue does have rule-making power to assist him in assessing and collecting taxes (RCW 82.01.060(1)(2)) he, like the legislature, did not adopt or employ rules providing for apportionment during the period in question. The failure by the Department to provide such is unconstitutional as well. Further, in light of the rule of construction described immediately above, there is nothing in the statute from which he derives his powers which permits an exception to the rule against retroaction and therefore the Department is prohibited from such an attempt to correct the constitutional flaw of both the regulations and the property tax statute. As the U.S. Supreme Court concluded in <u>Meyer v. Wells Fargo and Company</u>, 223 U.S. 298 (1912):
>
>> "The Court cannot reshape a taxing statute which includes elements beyond the state's power of taxation, simply because it embraces elements that it might have reached had the

> statute been drawn with a different measure and intent."

Because the legislature and Department of Revenue might have drafted the statute and regulations to meet the apportionment requirement, but failed to do so, it is impermissible to make any such retroactive attempts now.

It has been amply demonstrated that the ship . . . is not more or less permanently located in this state but is absent from here on a regular basis each year for months at a time during the [operation]. At other times of the year it also leaves the state for periods of time ranging from several days to months depending on the operations it undertakes. With these prolonged absences it has not become incorporated into the personal property of this state. When the facts of this case are considered with the law of situs for tax purposes, the [vessel] does not have situs in Washington and therefore is not subject to any tax per WAC 480-12-255. Its situs remains at the domicile of its owner . . . Leasing Corporation.

Alternatively Taxpayer maintains that the imposition of an unapportioned tax is in violation of the Commerce Clause of the United States Constitution because it does not meet the second part of the Complete Auto Transit test described above. Furthermore, it is impermissible to retroactively impose apportionment in an attempt to correct the constitutional defect.

DISCUSSION:

Issue No. 1

[1] The taxpayer's assertion that Determination 85-308 effectively ignores the ruling of Determination 83-36 that the employees whose payroll and payroll costs are allocated were employees of the affiliates themselves and not . . ., is misleading and incorrect. Determination 83-36 simply resolved the question whether the employees were those of . . . , for tax reporting purposes. It ruled that they were not, only after extensive and convincing testimony from both . . . and [sub], supporting that conclusion. As between the affiliates, including the taxpayer here, Determination 83-36 did not attempt to further resolve the employment questions, nor was that matter even within the scope of the appeal by . . . which resulted in Determination 83-36. However, Determination 85-308 does not rule that the employees in question were those of . . . , nor does it rule that

they were all employees of the taxpayer, [sub], exclusively. The Determination very clearly remands this issue to the Audit Section for the purpose of adjusting out all of the allocated payroll costs of employees who were dedicated, 100 percent, to specific affiliates. Thus, the taxpayer's assertion that the Determination rules that all of the employees were the taxpayer's is clearly incorrect.

Moreover, the taxpayer has provided no evidence whatever which establishes that the remaining employees were not its own. The taxpayer's own petition states that it did not maintain any records reflecting which employees worked for which affiliates (except the 100 percent dedicated employees). It also asserts that there is no more evidence that these were employees of the taxpayer than that were employees of other affiliates.

We disagree. The best evidence is the books and record of the taxpayer itself, where all employee payroll costs, overhead, and administrative costs are recorded. These are not recorded as costs of other affiliates; rather they are allocated to and recovered from the other affiliates. Most importantly, the taxpayer testified in 1983, is support of its parent, . . . , that the employees whose costs were allocated were mostly its own employees. It cannot be heard to say now, when its own position results in tax liability, that the employees are really someone else's. Suffice to say that the taxpayer has failed to establish that the employee costs in question are not its own costs, which were compensated by the affiliates through the parent, ... derives the revenue from its affiliates and pays for the taxpayer's operating costs. That somewhat circuitous compensation scheme does not obviate the attendant tax liabilities.

We are not insensitive to the taxpayer's arguments about the case law it has cited, nor do we disagree with those propositions. They are simply immaterial to the issue before us here. It is not dispositive of the issue, for example, that there was no written contract for employee services between the taxpayer and the affiliates like there were in the cases cited. It is the substance of what took place in the taxpayer's case here which controls the tax consequences. The Revenue Act of this state deals with actual business relationships and transactions, not exclusively with contractual agreements. We are convinced, by the taxpayer's own testimony in this case and previously that the employee, overhead, and administrative costs allocated between affiliates for EDP support, accounting services, coordination of vessel movements and scheduling, executive management, purchasing, marketing and sales, and vessel maintenance supervision, were the taxpayer's own costs for services it provided itself to the family of affiliated companies. We are also convinced, by the very structural organization of the conglomerate of related companies explained by the taxpayer, that it was fully compensated for the services rendered. In short, . . . collected the revenues from its affiliates and paid the taxpayer's costs. Under the definition of "gross income of the business," at RCW 82.04.080, there was "value proceeding" to the taxpayer, "by reason of the transaction of the business engaged in . . ." We are convinced, after reviewing all of the evidence, testimony, and arguments, that the salaries and other allocated administrative services allocations have been properly included within the Service tax measure.

[2] Concerning the corporate computer allocation; the findings of Determination 85-308 were based upon the understanding that these costs represented the affiliate companies shares of expenses connected with the computer program operations within this state. That is, there were employees, technicians, and actual computer equipment uses and overhead expenses attributable to activities exclusively within Washington State by the taxpayer, on behalf of the other affiliates, which were charged off against those affiliates. The taxpayer was compensated for these expenses by virtue of having the expenses paid by . . . . This is precisely in line with the organizational structure and financial arrangements that . . . and the taxpayer have previously testified to and represented to the Department. We believed that testimony then and we do now. Moreover, the audit report itself reflects, in Schedule V where these cost allocations are collectively grouped, that "amounts representing Internal Charges to [sub's] own divisions and services performed out-of-state have been deducted to arrive at taxable amounts." There is no evidence, other than the taxpayer's gratuitous statement that these computer services are performed in California, which could go to establish that the executive computer allocations item represents exclusively the cost of services performed outside this state. The fact that the . . . data base is located in San Francisco does not mean that there weren't also many services and expenses in Washington related to the computer program. Clearly there were because the taxpayer allocated those expenses between the various affiliate companies and recovered these costs. Again, the audit report expressly states that services rendered outside this state were deducted from the tax measure. However, upon further consultation with the Audit Section, it appears that the executive computer allocation does include the value of some services rendered by . . . through the San Francisco data base, directly to affiliates. The audit theory for not deducting these values from the tax measure was that these were actually the direct costs of the taxpayer, [sub], who was solely liable for payment. Thus, the deduction for advances and reimbursements under WAC 458-20-111 (Rule 111) was not available. In short, the Audit Section

concluded that the taxpayer purchased the computer services itself, from . . . , and then recovered their value from the various affiliates who used the services. Since the allocation was done by the taxpayer on an estimated basis rather than an actual basis, there was no way to determine exactly how much computer services each affiliate actually used. Conversely, the taxpayer explains that it did nothing more than the accounting for these services between the respective affiliates and that the services were entirely rendered directly for the affiliates outside this state.

We find that Rule 111 is not appropriate for application in this case, for either the purpose of gaining or denying tax deduction. The taxpayer has not claimed deduction under this rule for any costs paid on behalf of the affiliates. Moreover, it is not proper for the Department to assume that all of the computer services are taxable in Washington State simply on the grounds that the Rule 111 advances and reimbursements deductions do not apply. Rather, there are other reasons for the nontaxability of some of this computer services revenue. That is, it clearly appears that the value of executive computer services allocated among the various affiliates included a mix of services, some rendered by the taxpayer in this state and others rendered directly by . . . in San Francisco. Simply because the expenditures for these services were allocated together on the taxpayer's records here does not mean that the services were rendered here. Of course, Washington State does not have jurisdiction to tax revenues from services which are rendered entirely outside this state. When services are rendered both within and outside this state, WAC 458-20-194 (Rule 194) provides for apportionment between the respective states where the services are rendered. We find this rule to be appropriate in this case. Under its provisions, when actual records of the amount and value of services rendered are not maintained, a cost-of-doing-business formula is to be used. From the record and audit detail it appears that it can be determined how much of the total executive computer costs were attributable to the taxpayer's own activities in Washington. Only that percentage is taxable here. The Audit Section will reexamine the records to derive the appropriate percentage. If it is not possible to determine that percentage with reasonable certainty based upon the taxpayer's records, it is the Department's experience that only 25 percent of computer services operations derive from support activities other than the hardware and software services at the data base. Thus, in the absence of actual records, this is an acceptable and fair apportionment basis.

Conclusion

The taxpayer's petition with respect to Issue No. 1 is sustained in part and denied in part. Schedule V of Tax Assessment No. . . . will be amended to delete from the Service tax measure of the value of "salaries and fringes" attributable to employees who were dedicated 100 percent to affiliate companies. This assessment will also be adjusted so as to include only the value of executive computer related expenses incurred by the taxpayer in this state. In the absence of records of the latter value, 25 percent of the computer program costs will be assessed for tax.

Issue No. 2

[3] We have excerpted from the taxpayer's petition, at great length, its various arguments concerning its income from selling unused federal tax benefits and credits. This was done because we do not wish to appear summary in our treatment of this question. However, ingenious though the taxpayer's arguments may be, the overriding fact is that the taxpayer sold its tax credits to others, at arm's length, for valuable consideration. It did not sell the assets which derived the tax credits. It sold the credits themselves, which are intangible rights and benefits which the taxpayer owned in this state, with their situs here. Clearly, the taxpayer is engaged in business in this state as defined by RCW 82.04.050 and it could not have sold its tax credits without, ". . . the exercise of corporate or franchise powers . . ." which the statute includes as engaging in business. The taxpayer did not render any services which derived this income. Thus, we are not concerned with the many arguments postulated by the taxpayer about apportionment or negotiations occurring outside this state which resulted in the safe harbor lease arrangements. The taxpayer sold intangibles with situs in this state which resulted in gross proceeds in this state. The statutory measure of the Service business tax is "Gross income of the business," which is defined by RCW 82.04.080 to include all "emoluments however designated." The Department of Revenue has uniformly and consistently asserted tax liability upon amounts actually derived from businesses' sales of tax credits under ERTA. There is no federal law prohibiting such state taxation or preempting this field of taxation, nor has the taxpayer referred us to any statutory law or case law prohibition. Rather, the taxpayer's arguments deal with the semantics of Washington State statutes of the Revenue Act, and seek to somehow take business income from selling tax credits outside of the scope of these statutes. However, we are satisfied that the ruling of Determination 85-308 fully and correctly explains the taxability of income from safe harbor leases and federal tax credit sales. We hereby reaffirm that position and hold that the sale or transfer of federal tax credits and benefits under ERTA constitutes "engaging in business" in this state, the proceeds from which constitute part of taxable "gross income of business."

The taxpayer's first alternative argument, seeking the deduction of RCW 82.04.4281 for investments or the use of money as such is simply spurious. The taxpayer had made no investment in the legal or traditional sense. To argue that the outright sale of tax credits for a direct consideration constitutes an "investment" because the seller originally invested in the capital assets which generated the credits is simply too remote and convoluted for our serious consideration here. Again, there is not the slightest support or authority for such a proposition.

[4] The taxpayer's second alternative argument, seeking an apportionment of the tax credits sales income, is also misdirected. As noted earlier, this income is not derived from rendering any specific services either within or outside this state. While it is true that RCW 82.04.290 taxes amounts derived from services rendered, it also encompasses amounts derived from, "engaging within this state in any business activity," which is not otherwise expressly tax classified. There is no provision under the law for apportionment of amounts derived from the sale of intangible business benefits and tax credits with their situs exclusively in this state.

Conclusion

The taxpayer's petition is denied with respect to this issue, and Determination 85-308 is sustained.

Issue No. 3

[5] Our review of the taxpayer's testimony and the entire record of this case pertinent to this issue, as further illucidated at the June 4, 1986 hearing, convinces us that the [vessel] is used primarily, if not exclusively, in conducting interstate commerce. The whole purpose of employing this vessel was to actually tow or haul other interstate exempt watercraft which were laden with cargo being transported to Alaska for hire. There is no evidence of any actual intrastate use within Washington waters. That is, the evidence establishes that this vessel was used, at all times during the audit period, only as an inseparable part of what was clearly a continuing interstate movement of property for hire. RCW 82.12.0254 and Rule 175 do not bifurcate such interstate movements for purposes of taxing the portion within Washington waters.

[6] We have researched the taxpayer's references to the common and ordinary meanings of the term "therewith" as used in the law. Its common and ordinary meaning is simply "together with" or "as part of." In respect to its use in the statute and rule it means together with and as part of towing property for hire. In this

case it has been established that the vessel was used many times, but only to actually recover and tow breakaway barges and vessels during the interstate sealift operations. This was its actual use, not merely the standby availability for this use.

[7] When the [vessel] was moored in this state preparatory to actual use in interstate commerce it was not being stored, "preparatory to subsequent actual use or consumption within this state," under RCW 82.12.010(2). There simply was no subsequent actual use in Washington distinct from the tax exempt interstate use of the vessel. We agree with the conclusion of Determination 85-308 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, and those succinctly stated in the taxpayer's petition, we must conclude that the use tax exemption of RCW 82.12.0254 and Rule 175 is fully available in this case. This ruling must not be understood to extend this exemption to any support vessels or service vessels which are not used for carrying or towing cargo.

Because of the ruling above it is unnecessary to respond to the taxpayer's collateral arguments on this issue.

Conclusion

The taxpayer's petition is sustained with respect to Issue No. 3. The use tax assessed upon the vessel, . . . , will be deleted.

[8] First, it must be stated with clarity here that we are not at all concerned with the application of either WAC 458-17-100 (the regulation which applies apportionment of property tax for vessels as of January 1, 1986) or Substitute House Bill No. 1827, codified as RCW 52.12.101 et. seq. (the statutory law which provides for apportionment of property tax upon ships and vessels for collection in and after 1987). Neither the rule nor the law were adopted and effective for the period in question here. Rather, the entire issue before us turns upon the question whether WAC 458-12-255 was appropriate for application in this case and whether that "home port" rule was constitutionally infirm. We find that the rule application was appropriate and that it was not in violation of constitutional, Commerce Clause, tax prohibitions.

The facts of this case, as reaffirmed by the taxpayer, reflect that the vessel, . . . was moored and located in this state the majority of the time during the years in question. It was here, continuously and cumulatively, for more time than it was located in any other place or in all other places combined. It was never located in Illinois, the domiciliary state of its owner. Moreover, it was leased to . . . and sublet to the taxpayer. The taxpayer exercised exclusive dominion and control over the vessel, even to the exclusion of its owner, . . . Leasing Corporation. The lessee/operator of the vessel has business domicile and situs in Washington State and the vessel had far more than mere temporary or transient presence in this state. Under the home port doctrine, the prevailing case law, and within the scope and intent of Rule 255, Washington State was the home port of the [vessel]. It is the state in which the vessel was regularly moored and maintained for periods in excess of six months annually, and from which it was regularly dispatched in connection with the sealift operations. No other state has attempted to improse its property tax upon this vessel nor, in our view, could any other state validly do so.

The home port doctrine, while recently viewed with disfavor by the courts, has not been ruled to be violative of the Commerce Clause. The dicta of Japan Lines, supra, simply emphasized that the doctrine is outdated and has given way to the evolutionary application of the seemingly more fair "apportionment" approach. Such emergent concepts account for Washington State's latent abandonment of the home port rule as well. This does not mean, however, that the home port doctrine was invalid or constitutionally infirm during its history of application. It was a doctrine which forestalls the need for apportionment because it recognizes that only one jurisdiction may impose property tax - to wit, the state of home port situs. Because, under the very concept of a single home port, only one state attains taxing jurisdiction at all, apportionment is not an issue. That is, fair taxing jurisdiction is completely accomplished by looking to the home port for exclusive taxing authority rather than bifurcating that jurisdiction as is done through apportionment. While apportionment is seemingly more equitable and is the current bent of the courts, this does not imply that the "home port" cases have been overturned or that the doctrine was somehow always constitutionally infirm. Moreover, none of these case rulings which have rejected the home port doctrine in favor of apportionment deal expressly with the taxation of ocean-going vessels engaged in interstate transportation. The U.S. Supreme Court has expressly reserved that question. Japan Line Ltd. v. County of Los Angeles, supra, page 344.

[9] We agree with the taxpayer that any state tax levied upon instrumentalities of interstate commerce must meet the fourfold requirements of Complete Auto Transit, Inc. v. Brady, supra. This is true even of ad valorem, property taxes. Washington's property tax, on its face and as applied in this case, does meet those tests.

1. There is substantial nexus because the vessel was located in this state on the tax lien date and was regularly employeed here by a person engaged in business here.

2. The tax is fairly apportioned because only Washington State had jurisdiction to impose an ad valorem tax upon the value of the vessel. The tax is self apportioning under the home port doctrine.

3. The tax does not discriminate because it falls evenhandedly upon all personal property by this state, including those provided by the ports at which the vessel was moored.

4. The tax is fairly related to the services, benefits, and protections provided by this state, including those provided by the ports at which the vessel was moored.

Because the [vessel] was not engaged in foreign commerce operations and was not an instrumentality of foreign commerce, the constitutional inquiries stop with application of the above tests. The taxpayer has failed to establish, through any evidence whatever, that Washington State's property tax results in any unfair, unreasonable, or disproportionate tax burden. See Exxon Company v. Wisconsin Department of Revenue, 65 L.Ed 66 (1980). Thus, even if Washington State's rule had employed the apportionment concept during the period in question here, there would be no other jurisdiction to which to apportion any value for property tax assessment purposes.

For all of these reasons and the reasons and authorities referenced in Determination 86-20, we must conclude that the property tax has been properly assessed.

Conclusion

The taxpayer's petition with respect to Issue No. 4 is denied.

DECISION AND DISPOSITION:

Tax Assessment No. . . . ([sub]) will be adjusted according to the guidelines contained herein. The amended assessment will be due for payment on the date to be shown thereon.

Property tax valuation upon the [vessel] (. . . Leasing Corp.) is sustained in full.

DATED this 18th day of October 1986.