

Cite as 1 WTD 151 (1986)

BEFORE THE INTERPRETATION AND APPEALS SECTION  
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 Personal Property    )  
Tax Assessment of                        )  
  )                       No.     86-  
247    )  
  )                       Registration No.   . . .  
)    )  
  )   Re:   Watercraft  
Valuation                                        )  
  )                       Tax Statement                        ) 1986

[1] BOAT TAX:     SITUS -- APPORTIONMENT BASED ON PHYSICAL  
      PRESENCE     IN     WASHINGTON     --     FISHING     VESSEL     --  
      CONSTITUTIONALITY OF NON-APPORTIONMENT.   Fishing vessel  
      owned by Washington domiciliary was moored in Washington  
      on lien date of January 1, 1985 and up for sale; remained  
      moored until sold and removed by buyer in July 1985 to  
      Alaska.   Vessel held to have actual taxable situs in  
      Washington.   No requirement to apportion tax.   Department  
      cannot rule on constitutionality of non-apportionment.  
      Effective January 1, 1986, WAC 458-17-100 and legislative  
      act provide for apportionment of assessment.

These 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:   June 12, 1986

NATURE OF ACTION:

Petition for apportionment of personal property tax levied in 1986 on a commercial fishing vessel located in Washington for a portion of the assessment year of 1985.

#### FACTS AND ISSUES:

Abraham J. Krebs, Administrative Law Judge--As reported on June 3, 1985 to and accepted by the Property Tax Division of the Department of Revenue, . . . (taxpayer) purchased the fishing vessel . . . in 1973 for \$2,251,164.16 which included the motor and accessories.

Based upon the reported vessel purchase price of \$2,251,164.16, the taxpayer was assessed personal property tax based upon a 1985 valuation of \$1,177,359 for tax due in the amount of \$4,275.11 by April 30, 1986 (half tax could be paid by April 30 and second half by October 31, 1986). As of this date, the tax plus interest and penalty remain due.

. . . . It should be noted that the delinquent taxes, interest and penalties pertaining to the 1984 and 1985 tax years have been subsequently canceled because the vessel in question was not located in Washington on the first day of January (lien date) during the years 1983 and 1984 subject to collection of personal property tax in 1984 and 1985 respectively (WAC 458-12-060), and because it was apparently believed that the vessel had no taxable situs in Washington in 1983 and 1984.

On November 2, 1984, the vessel in question was permanently moored at the taxpayer's . . . facility . . . and subsequently sold on May 30, 1985 to . . . See taxpayer's letter dated January 10, 1986, . . . .

On July 20, 1985, . . . paid the purchase price of \$1,750,000 to the taxpayer. On July 29, 1985, . . . took the vessel in question out of the state of Washington to Alaskan waters where the vessel has remained without ever returning to Washington.

In purchasing the vessel, . . . assured payment of any properly assessed taxes payable during the year of the sale (1985) and thereafter. . . . is a successor by assignment to the rights of the taxpayer and protests the levying of the 1986 personal property tax as improper because there is no apportionment of the ad valorem tax based on and attributable to the vessel's location in Washington from January 1, 1985

through July 29, 1985 where the vessel is an ocean-going vessel engaged in interstate and foreign commerce. . . . asserts that the due process clause of the 14th Amendment is violated by Washington's unapportioned ad valorem tax levied upon a vessel employed in interstate commerce even though the owner of the vessel is domiciled and the vessel is registered in the taxing state. Standard Oil Company v. Peck, 342 U.S. 382, 96 L.Ed. 427 (1952). Additionally, . . . asserts that the unapportioned taxation on property engaged in interstate commerce creates an impermissible burden on interstate commerce in violation of the United States Constitution. Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 51 L.Ed. 2d 326 (1977).

. . . further asserts that the vessel in question had a clear tax nexus with the state of Alaska, and no nexus or insufficient nexus in 1985 with Washington to justify the imposition of any taxation upon the vessel.

The issues presented are as follows:

1. Did the vessel in question have nexus (situs) and/or sufficient nexus (situs) in Washington in 1985 so as to be subject to the personal property tax assessed in 1985 and levied in 1986?
2. Should there be an apportionment of the tax based upon the 1985 time period within which the vessel was located in Washington?
3. Is Washington's unapportioned ad valorem (according to value) property tax unconstitutional as violative of the due process clause of the U.S. Constitution's 14th Amendment when levied upon a vessel employed in interstate commerce?
4. Is Washington's unapportioned ad valorem property tax unconstitutional as violative of the interstate commerce clause of the U.S. Constitution because it creates an impermissible burden on interstate commerce?

#### DISCUSSION:

Property taxes are imposed by RCW 84.36.005 which in its entirety states:

All property now existing, or that is hereafter created or brought into this state, shall be subject to assessment and taxation for state, county, and

other taxing district purposes, upon equalized valuations thereof, fixed with reference thereto on the first day of January at twelve o'clock meridian in each year, excepting such as is exempted from taxation by law. (Emphasis supplied.)

A partial exemption for ships and vessels is granted by RCW 84.36.080 which in its entirety states:

All ships and vessels which are exempt from excise tax under subsection (2) of RCW 82.49.020 and subsection (10) of RCW 88.02.030 shall be and are hereby made exempt from all ad valorem taxes, except taxes levied for any state purpose. (Emphasis supplied.)

In effect, RCW 84.36.080 provides that all ships and vessels which are exempt from the excise tax as vessels used exclusively for commercial fishing purposes (RCW 82.49.020(2)) or vessels primarily engaged in commerce which have or are required to have a valid marine document as a vessel of the United States (RCW 88.02.030(10)) are exempt from all ad valorem taxes except taxes levied for any state purpose. The state levies ad valorem taxes for support of common schools (RCW 84.52.065).

The . . . is a vessel used exclusively for commercial fishing purposes. The vessel in question was absent from Washington waters in 1983 and until November 2, 1984 when it was permanently moored by its owner, the taxpayer, at its . . . facility in . . . Washington, where the vessel remained until on or about July 29, 1985 when it was removed to Alaskan waters by the new owner . . . who purchased the vessel on May 30, 1985. The vessel was thus in Washington on January 1, 1985 (the lien date). RCW 84.36.005, supra.

The issues presented will be dealt with in the same order as presented.

1. Generally, personal property may be properly assessed for taxation only in a state where it has a situs. 71 Am.Jur.2d, State and Local Taxation Sec. 453.

Washington Administrative Code (WAC) 458-12-255 (Rule 255), which has the same force and effect as law, provides:

**Listing of property--Ships and vessels--Taxable situs in Washington.** The state of Washington has no

jurisdiction to tax ships, vessels, or boats having no situs within the state. Such vessels shall therefore be totally exempt from ad valorem taxation.

The county assessor shall be governed by the following general principles in determining whether a ship or vessel has situs within the state of Washington for taxation purposes:

(1) Situs for taxation of ships and vessels is the domicile of the owner, unless the vessels have acquired situs elsewhere. (Northwestern Lumber Co. v. Chehalis County, 25 Wash. 95 (1901)) The domicile of an individual is his permanent place of residence; the domicile of a corporation is its principal place of business. (AGO 3-25-1931)

(2) Situs for taxation is not controlled by place of home port or port registry. (AGO 2-20-1931)

(3) While the general rule is that situs is controlled by domicile of the owner, ships and vessels may be subject to taxation by a state in which they acquire actual situs. (Guiness v. King County, 32 Wn.2d 503 (1949)) In order to acquire actual situs in the state of Washington, regardless of the domicile of the owner, a ship or vessel must be more or less permanently, rather than [than] temporarily, located in this state. (Guiness v. King County, 32 Wn.2d 503 (1949)) If presence within the state is merely for the purpose of taking on and discharging cargo or passengers, or for the need of safety and convenience in conducting business, such vessels have not acquired actual situs. (AGO 2-20-1931) However, where the stay of a vessel is indefinite, and it is maintained in this state to suit the convenience of the owner or to be subjected to protracted local use, actual situs for taxation purposes is acquired. (Guiness v. King County, 32 Wn.2d 503 (1949).) (Emphasis supplied.)

Under Rule 255, "the domicile of a corporation is its principal place of business." The taxpayer corporation was registered with the Department of Revenue from February 1, 1981 until March 31, 1986 with its principal place of business at . . . , Washington. We therefore find that the taxpayer for purposes of Rule 255 and applicable property tax case law

was a domiciliary of Washington for the time period in question, that is, 1984 through July 29, 1985. Accordingly, the situs of the . . . for the assessment of personal property tax in 1985 was Washington, the state of domicile of the taxpayer owner. Rule 255.

Furthermore, the . . . acquired actual situs in Washington for taxation purposes when the taxpayer permanently moored the vessel at its . . . facility on November 2, 1984 where it remained until about July 29, 1985. Having acquired actual situs in Washington, the vessel is subject to ad valorem taxation by Washington. Rule 255 and Guinness v. King County, supra.

We reject the contention by . . . that the vessel had retained its situs (nexus) in Alaska when the vessel was brought by the taxpayer-owner to . . . on November 2, 1984 because the vessel was brought for refitting, repairs and to be sold. Rule 255 explains that a vessel does not acquire actual situs when its presence in Washington "is merely for the purpose of taking on and discharging cargo and passengers, or for the need of safety and convenience in conducting business." There is no evidence that the vessel was in Washington for such purposes. Rather, we find that the stay of the vessel in Washington was indefinite (it was up for sale), and it was maintained in this state to suit the convenience of the owner (the vessel was being refitted, repaired and up for sale). Rule 255.

We conclude that the vessel in question had actual situs in Washington as of January 1, 1985 (the lien date) and is therefore properly subject to personal property tax.

2. If the vessel in question is to have taxable situs in Washington, Sjong (as successor to the rights of the taxpayer) seeks apportionment of the personal property tax on the basis that the vessel was located in Washington from January 1, 1985 to July 29, 1985 during the 1985 assessment year for which the tax is payable in 1986.

Concomitant with RCW 84.36.005, supra, RCW 84.40.020 in pertinent part provides:

. . . All personal property in this state subject to taxation shall be listed and assessed every year, with reference to its value and ownership on the first day of January of the year in which it is assessed: Provided, that if the stock of goods,

wares, merchandise or material, whether in a raw or finished state or in process of manufacture, owned or held by any taxpayer on January 1 of any year does not fairly represent the average stock carried by such taxpayer, such stock shall be listed and assessed upon the basis of the monthly average of stock owned or held by such taxpayer during the preceding calendar year or during such portion thereof as the taxpayer was engaged in business. (Emphasis supplied.)

The legislature in enacting RCW 84.40.020 obviously recognized that there were situations where assessments controlled strictly by the January 1 date required modification but did so only with respect to "stock of goods, wares, merchandise," etc. The legislature did not modify assessments with respect to ships and vessels, whose ownership or actual situs in Washington ("in this state") changed after January 1 of the year of assessment.

Our research of the Washington statutes and the WAC pertaining to personal property taxation for the year of assessment, 1985, has revealed no applicable apportionment formula. Nor has . . . revealed any to us. Apportionment of the personal property tax would result in the granting of an exemption and, in effect, carve out an exemption where none existed.

The apportionment effect resulting in an exemption is evidenced by exemption statute RCW 84.36.150 (cancellation in whole or in proportionate part of certain products shipped to points outside the state before April 30 of the year of assessment).

Nevertheless, . . . has pointed to two U.S. Supreme Court decisions involving apportionment of property taxes to support its claim for apportionment, Standard Oil Corporation v. Peck, 342 U.S. 382 (1952) and Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434 (1979).

In the Standard Oil case, an Ohio corporation owned boats and barges which it employed for the transportation of oil along the Mississippi and Ohio Rivers. The vessels neither picked up nor discharged the oil in Ohio. The vessels were registered in Ohio but only stopped in Ohio for occasional fuel or repairs. The stops did not involve loading or unloading cargo. Ohio levied an ad valorem property tax on all of these vessels. The Court found that the taxing power of the state (Ohio) of domicile had no application because:

. . . most, if not all, of the barges and boats which Ohio has taxed were almost continuously outside Ohio during the taxable year. No one vessel may have been continuously in another state during the taxable year. But we do know that most, if not all, of them were operating in other waters and therefore under Ott v. Mississippi Valley Barge Line Co. 336 U.S. 169 . . . [1949] could be taxed by the several states on an apportionment basis. The rule which permits taxation by two or more states on an apportionment basis precludes taxation of all of the property by the state of the domicile. (Emphasis supplied.)

The Court decided that Ohio could not levy an ad valorem property tax on all of the vessels. Where the Court had allowed the domiciliary state to tax the entire fleet of airplanes operating interstate (Northwest Airlines, Inc. v. Minnesota, 322 U.S. 292) or the domiciliary state to tax all the rolling stock of a railroad (New York ex rel. New York C. & H. R. R. Co. v. Miller, 202 U.S. 584), it was not shown that "a defined part of the domiciliary corpus" had acquired a taxable situs elsewhere.

The facts in this case are quite different. Here we are dealing with one fishing vessel, the . . . not boats and barges transporting oil between other states excluding the domiciliary state (the Standard Oil case); not an entire fleet of airplanes operating interstate (the Northwest case); and not all the rolling stock of a railroad (the Miller case). Where the Court spoke of an "apportionment basis," it appears to us that part ("defined part of the domiciliary corpus") of the boats and barges, part of the entire fleet and part of the rolling stock which had "acquired a taxable situs elsewhere" would not be taxable by the domiciliary state. It does not appear to us that apportionment on the basis of time period within the taxing state was considered. Rather, actual situs appeared to be the crucial factor.

Furthermore, it does not appear that any of the taxing statutes in the above cases contained a "lien date" as is present in Washington's statutes, RCW 84.36.005 and RCW 84.40.020, supra.

In the Japan Line case, counties and cities in California levied property taxes on containers owned by six shipping companies incorporated in Japan who had their principal places



of business and commercial domiciles in Japan. They operated vessels used exclusively in foreign commerce. The vessels were registered in Japan and had their home ports there. The containers, like the ships, had their home ports in Japan and were used exclusively in the transportation of cargo in foreign commerce. Each container was in constant transit save for time spent undergoing repair or awaiting loading and unloading of cargo. All the containers were subject to property tax in Japan and, in fact, were taxed there. A container's average stay in California was less than three weeks.

Property present in California on March 1 (the "lien date" under California law) of any year is subject to ad valorem property tax. A number of the containers in question were physically present in California on the lien dates in 1970, 1971 and 1972. The number was fairly representative of the containers' "average presence" during each year. The California counties and cities levied property taxes in excess of \$550,000 on the assessed value of the containers present on March 1 of the three years in question.

The U.S. Supreme Court, at page 444 of the Japan Line case, determined that the question to be decided was a narrow one, that is:

. . . whether instrumentalities of commerce that are owned, based, and registered abroad and that are used exclusively in international commerce, may be subjected to apportioned ad valorem property taxation by a State.

The Court held that the imposition by the California counties and cities of a fairly apportioned (the parties had stipulated that the number of containers present on the lien date was fairly representative of the "average presence" of all containers during each tax year) ad valorem property tax unconstitutionally conflicted with the foreign commerce clause of the U.S. Constitution.

Again, the facts in this case are quite different than those in the Japan Line case. Here we are dealing with one fishing vessel, the . . . not containers employed in foreign commerce. Furthermore, with respect to the . . . the taxpayer-owner of the vessel is domiciled in Washington, the vessel had actual situs in Washington, and the vessel was not engaged in foreign commerce. But, in the Japan Line case, the owners were domiciled in Japan; the containers had an "average presence" in California, not actual situs; and the containers were employed exclusively in foreign commerce.

Furthermore, where the U.S. Supreme Court has approved apportionment formulas for ad valorem property taxation in the context of railroads based upon relative railroad track mileage (Pullman's Palace Car Company v. Pennsylvania, 141 U.S. 18 (1890)), inland water transportation (Ott and Standard Oil, supra), and airlines (Braniff Airways, Inc. v. Nebraska State Board of Equalization, 347 U.S. 590 (1954)), the U.S. Supreme Court has expressly reserved the question of whether apportionment principles can be applied to ocean-going vessels engaged in interstate commerce. See Japan Line case, supra.

We conclude that there is no provision nor basis in the statutes and in the WAC pertaining to personal property taxation for the assessment year of 1985 to allow for apportionment based solely upon the time period of the vessel's physical presence in Washington. We further conclude that the U.S. Supreme Court decisions, made upon a case by case basis where the fact situations were quite different from the one in the case at hand, do not support nor mandate apportionment in this case. Therefore, we must reject the application of apportionment to the tax in question.

3 and 4. Washington's unapportioned ad valorem property tax is challenged as unconstitutional as being violative of the due process clause and the interstate commerce clause of the U.S. Constitution.

The Department of Revenue, as an administrative agency, must presume the constitutionality of the laws it administers. The Department will not and may not rule upon such assertions of unconstitutionality. The Washington State Supreme Court has directly expressed this position in Bare v. Gorton, 84 Wn.2d 380 (1975) as follows:

An administrative body does not have the authority to determine the constitutionality of the law it administers; only the courts have that power.

Accordingly, we must decline to rule on the constitutionality of Washington's unapportioned ad valorem property tax assessed on the fishing vessel.

On November 6, 1985, the Department adopted and promulgated WAC 458-17-100, . . . , with an effective date of January 1, 1986 for taxes levied for collection in 1987 and thereafter. This regulation embodies an apportionment procedure for fishing vessels "based upon the number of days or fraction

thereof that the vessel is within the limits of the state during the preceding calendar year." WAC 458-12-255, supra, was repealed.

The 1986 Washington Legislature Regular Session enacted Chapter 229, SHB 1827 which embodied substantially the same apportionment procedure for fishing vessels as in WAC 458-17-100. This act is effective for taxes levied for collection in 1987 and thereafter.

. . . contended that the Department adopted WAC 458-17-100 because of a realization that the unapportioned ad valorem property tax might be found unconstitutional. Such was not the case. In 1984, the Washington Legislature enacted RCW 84.08.200 which became effective March 28, 1984. This statute provides for the listing with the Department of Revenue of all ships and vessels which are subject to ad valorem taxation and assessment by the Department of Revenue. Previously, the ships and vessels were listed with and assessed by the county assessor (RCW 84.04.040 and RCW 84.40.060). The enactment of RCW 84.08.200 necessitated the repeal of WAC 458-12-250, 255, 260 and 265 to reflect the enactment of RCW 84.08.200. For those purposes, WAC 458-17-100 was adopted. Prior to adoption of WAC 458-17-100, the Department considered the court decisions which had involved apportionment principles in ad valorem property taxation and preferences of Washington vessel owners for the apportionment approach. However, the Department was not motivated to adopt WAC 458-17-100 on constitutional grounds. The November 6, 1985 adoption of WAC 458-17-100 can be said to have been in anticipation of the 1986 legislative enactment of the apportionment procedure which was sought and fostered by the fishing and transportation industry.

For the reasons stated and applicable law set forth, we must sustain the unapportioned personal property tax assessed in 1985 and levied for collection in 1986.

#### DECISION AND DISPOSITION:

The taxpayer's petition is denied. The personal property tax levied for collection in 1986 plus interest and penalty will be due for payment in accordance with notice from the Personal Property Tax Section of . . .

DATED this 12th day of September 1986.